CIVIL ASPECTS OF BANK ACCOUNTS IN SWITZERLAND

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Content

1. Universal Succession

1. After death of a client the account is transferred by law to the (community of) heirs (Art. 560 Swiss Civil Code [SCC]). Upcoming is the question how the bank becomes knowledge about the demise of their clients. On a regular basis the bank will receive a message from heirs such as by receiving a notice of death. The question comes up, at what point of time the bank must start a procedure on its own initiative. This is at the latest necessary if the period of time for a declaration of presumed death is given or if the requirements for such a procedure are fulfilled ex officio (according to Art. 550 SCC if the testator would have become 100 years old).

2. Power of attorney after inability to act / after death

2. On the date of death of the bank client, powers of attorney on a bank account basically cease

(Art. 35 al. 1 Swiss Code of Obligations [SCO]).

3. Powers of attorney are especially useful, if the account holder and (future) deceased has health- impaired problems (is in a coma, mentally unstable or otherwise incapacitated) and is no more able, to handle his own matters. In these cases

it may happen that the ability to act may be affected, in the first place factually and later on also legally, temporarily with variable degrees (see GEISER, p. 30). The capacity to consent must be given in both moments, at the time of advising as well as at the time of the execution of an affair (Swiss Federal Supreme Court [Schweizerisches Bundesgericht - BGer] 5A_12/2009). This capacity lacks if a person is no more able to deprive from the influence of another person (BGer 5A_748/2008: old testator with relation to young woman). Based on the text of Art. 35 SCO the old doctrine assumed that the power of attorney ends compulsory with loss of the ability to consent respectively with the making of a ward of court (see ZACH, Art. 35 SCO N 16). Following the new doctrine (see GEISER, p. 30) the Swiss Federal Supreme Court (Entscheide des Schweizerischen Bundesgerichts [BGE] 132 III 221 consideration [c.] 2: continuation of a court procedure for the victim of an accident) decided that the power of attorney may continue after inability to act if the principal has disposed accordingly. This is necessary in many cases in order to prevent a lack of representation (GEISER, p. 30). As many old forms are in circulation which do not regulate this question expressly the question comes up if the regulation that the power of attorney shall be valid after death covers also the case after inability to act. In case of doubt the answer is yes.

4. The power of attorney, coming into existence with the death of the deceased is existing in Swiss law (BGer Semaine Judiciaire [SJ] 2000 I 421 c. 3c; ZACH, Art. 35 SCO N 47) but is subject to the form of a testamentary disposition (Art. 498 et seq. SCC) (GEISER, p. 35). As banks fear the misuse of these powers they do not accept them usually and therefore such powers are not of practical relevance (ZOBL, Aktuelle Juristische Praxis [AJP] 10/2001 p. 1009; OEXL, p. 17).

5. The power of attorney after death can be established without any formal restriction and is the usually used by banks (so called “T-power”) (ZOBL, AJP 10/2001 p. 1008). In the field of real estate law the power after death does not exist (BIBER, p. 59). At the time of death the principal is replaced by his heirs. The content of the power remains basically unchanged (Blatter fur Zurcherische Rechtsprechung [ZR] 1998 No. 24). It may be that special instructions of the principal are added at this time. Furthermore the new purpose must be respected (ZACH, Art. 35 SCO N 59) which is to keep the interests of the heirs (BGer 4C.234/1999, c. 3 = Praxis des Bundesgerichts [Pra] 2002 Nr. 73 = SJ 2000 I 421; OEXL, p. 16). As every heir can revoke the power of attorney banks ask for a certificate of inheritance (Art. 559 SCC) as soon as the demise of the bank client becomes known. With this document the bank can determine the persons which have the right to revoke the power of attorney. A power of attorney can be used continuously if all heirs agree, what happens in many cases. As the issuing of a certificate of inheritance can last several months (the heirs have a time limit for

renunciation of three months

- Art. 567 al. 1 SCC - and the consultation of the civil registry records by the probate office requires some time) a bank account can be blocked for a long time (banks pay in this intermediate period the estate liabilities and the so called "courant normal" (current costs) from the estate account (BREITSCHMID, successio 5/2010, 89; HAMM/FLURY, Schweizerischer Treuhander [ST] 2002 p. 36). This time frame can be bridged by accounts of surviving spouses and/or children on their own name, by joint accounts or by an executor (Art. 517-518 SCC) who receives his certificate within a few days. If no executor has been appointed by the testator, in situations of conflict only a representative of the community of heirs (Art. 602 al. 3 SCC) can act on behalf of the heirs (BREITSCHMID, successio 5/2010, 89).

3. Joint Account

5. A joint account/depot (compte-joint / depot-joint) where the remaining holder can dispose singly after the death of the other holder is called an «Or-account/depot» (ZOBL, AJP 10/2001 p. 1010). But this does not mean that the property of the assets has passed entirely to the surviving holder of the account/depot (BREITSCHMID, Erbfolge, p. 54). The parties regulate (among themselves / internally) how the account is divided up between them (for example according to the rules of the marital community, or the rules of the simple partnership) (ZOBL, AJP 10/2001 p. 1011). In case of doubt every holder of the account/depot gets an equal share (see Art. 646 al. 2 SCC: co-ownership). If two spouses own a joint account/depot half of the value belongs to the estate (Art. 215 al. 1 SCC). The disadvantage of a joint account is that the bank may ask questions (for example concerning the beneficial owner) or it may check certain points (such as the one if interests of heirs can be violated) before payments are executed. But sooner or later the survivor will be able to dispose of the assets on the account/depot.

6. Sometimes bank agree with their clients a „provision to exclude heirs" with the content that the account/depot shall be transferred totally to the survivor and that the heirs of the deceased do not take over his position. The problem is that the concept of joint ownership in the sense of the common law does not existing within the civil law of Switzerland. In recent cases the courts ruled that the right of information of the heirs cannot be excluded by such a clause (ZR 2002 No. 26; Basler Juristische Mitteilungen [BJM] 2006 p. 100). The uncertainties lead to the conclusion that this clause is not appropriate for high volume business (OEXL, p. 18).

7. A joint account which allows only that the survivor and the heirs of the deceased dispose jointly is called «And-account/depot» (ZOBL, AJP 10/2001 p.

1010). After death of an account holder his heirs take over his position what leads to the common complications with the power to draw from the account/depot (HAMM/FLURY, ST 2002 p. 36).

1. Schenkungen - Gifts

8. The gift payable on death is a construction which has been used many times but in rare cases with success. If the deceased establishes a bank account in another's name and does not communicate this to the third person, the missing acceptance of the donee makes the transfer invalid. Besides gifts payable on death have to fulfill the formal requirements of testamentary dispositions and they usually fail due to inadequate form (BGE 127 III 390).

9. Gifts inter vivos are executed with more success. The testator can dispose during his lifetime and hand over assets (especially to the surviving spouse) assets which becomes their own property and which can be used until the estate is distributed.

4. Executorship

10. The executor has an irrevocable power to dispose of the estate (Art. 517-518 SCC). Among others he has the duty to manage the assets (especially in big estates, where it takes quite some time until the distribution can take place). He can also execute advance payments. He receives his certificate within a few days (KONZLE, p. 371 et seq.).

5. Information right of the heirs

11. The heirs can ask the bank to get information about the accounts/depots of the deceased. They need the information in order to prove their compulsory portions (forced shares) and to start a claim for the reduction of testamentary dispositions (Art. 522 et seq. SCC). It is amazing that banks again and again strike back at information requests as this cannot be successful: Neither the argument that a single heir has no information right is valid nor the argument that the bank agreed with the client a provision to exclude heirs (ZR 101 No. 26). The right of information is not limited in time, but the duty of the bank to keep records is limited to 10 years (Art. 962 CO), although most banks (if you give them enough time) can produce in most cases more than the records of 10 years.

12. In this context a decision of the Federal Supreme Court (BGE 128 III 314) has special relevance where Art. 527 par. 4 SCC (relinquishing of assets with the purpose of evasion) was interpreted in an extensive way. This decision gives estate planners reason to believe that in coming cases not only transfers inter vi-

vos of the last 5 years before death (Art. 527 par. 3 SCC) but all transfers before death have to be reviewed. The right of information therefore becomes even more important for the heirs.

13. Neither the banking secrecy nor the protection of personality are a barrier for the right of information of the heirs. In the same way as the deceased was able to ask for information (Art. 400 CO), now the heirs - who stepped in his place (Art. 560 SCC) - can ask for information. The protection of personality may restrict some categories of information from passing down to the heirs but information about assets and payments do not belong to those categories of information.

6. Foreign Account Holder

14 If a bank client does not live in Switzerland nevertheless Swiss law is applied on the

relationship between this client and a Swiss bank (General Terms of banks and Art. 117 al. 2

Swiss International Private Statute [SIPS]). The settlement of the marital property (among

spouses) and the division of the estate is - according to the rules of the international private law

- on a regular basis - subject to foreign law (Art. 55 and Art. 91 SIPS). As a consequence in such cases it is likely that several laws are applied at the same time and that complex questions arise.

15. The determination of jurisdiction shows a similar picture: Switzerland has only jurisdiction if the deceased had his domicile in Switzerland or if he has chosen Swiss jurisdiction (Art. 86-87 SIPS). Besides this Swiss jurisdiction is also given for some provisions such as the safeguarding in context of an action for recovery of an inheritance (BGer 5P.17/2002).

16. What does this mean for international estate planning? As far as possible the testator should determine the jurisdiction and the applicable law. Furthermore the heirs resp. the executor should clarify in advance what kind of documents are necessary in order to get access to bank accounts/depots in the different countries and what kind of powers the executor has in these countries.

7. Bank Accounts and Structures

17. If someone contributed money into a structure (foundation or trust with underlying company), the question arises if the heirs can ask for information from the trustee/board of foundation concerning a bank account of this structure. Under certain circumstances the court practice grants to the heirs an information

right (Cour de Justice de Geneve from march 20, 2003).

18. And what about the chances to execute a claim for reduction against a foreign structure? This depends from the country of origin of the structure and can be quite different. Some countries do not respect foreign compulsory portion rights of heirs and therefore do not recognize foreign judgments. But in other countries foreign compulsory portions are recognized for example Swiss compulsory portions vis a vis a Liechtenstein foundation (FL OGH from march 7, 2002).

Bestimmungen, 2. Teilband, 2. Unterteilband: Stellvertretung (Art. 32-40), Bern 1990; ZOBL DIETER, Probleme im Spannungsfeld von Bank-, Erb- und Schuldrecht, in: AJP 10/2001 p. 1007 ff.

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