NewsLetter LL

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SPECIAL LEGAL ISSUES REGARDING JOINT BANK ACCOUNTS

Sabine Kilgus

Asset management agreements between private clients and a bank are subject to the rules of mandate agreements. This means that the bank has to provide its services with due diligence in accordance with article 398 of the Swiss Code of Obligations (CO). These principles also apply if the bank's clients have a so-called joint account. However, the owners of a joint account have to be aware of the consequences and implications of joint ownership. Vis-à-vis the bank each joint account holder can exercise his or her rights individually provided that he or she has sole signature power. The bank is entitled to rely on the signature power established.

As a result, the Federal Supreme Court has dismissed a claim by a co-owner of a joint account who alleged damages from the bank for violation of the duty of care and diligence in managing the portfolio: The court denied the claim based on contract since the asset management agreement was only signed by one of the joint account holders; it was argued that there was no agreement with the second account holder who was the one seeking damages. It also denied damages based on tort. Unlike property, financial assets are not generally protected under the law of tort unless there is an explicitly stated legal duty to protect such assets. The court argued that the duty of care and diligence set forth in article 398 CO cannot be interpreted as a duty to protect third parties assets. Therefore the bank was found not liable in tort.

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REVISION OF THE SWISS DEBT ENFORCEMENT AND BANKRUPTCY ACT (DEBA) – AMENDMENT WITH WIDE EFFECTS

Giuseppe Mongiovì

Following the revision of the Lugano Convention, the Swiss Legislator has partially revised the Debt Enforcement and Bankruptcy Act (DEBA). The amendment particularly concerns the seizure of assets. Contrary to the former legal situation every final executory title authorizes its holder (and in particular every creditor residing in Switzerland) to a freezing order under the new article 271 section 1(6) DEBA. Additional conditions are no longer required. As there are instances where it is possible to execute a judgement even before it has become final, the creditor has to carefully evaluate the chances and risks of execution based on a freezing order in order to avoid future claims for damages on the part of the debtor resulting from premature seizure of assets. In order to facilitate debt enforcement proceedings the court issuing a freezing order can also decide on the seizure of assets of the same debtor throughout the entire territory of Switzerland. The creditor can address his/her request for seizure to the court at the place of the debt enforcement proceedings or at the place where the relevant assets are located. If the freezing order is sought for assets in more than one canton, the different cantonal authorities must coordinate the proceedings in order to achieve the seizure of all assets identified and indicated by the creditor.

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THE PROS AND CONS OF ARBITRATION AGREEMENTS

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Parties to pecuniary disputes can opt for their dispute to be decided not by an official court of a specific country but by an arbitral tribunal. The means to achieve this is the arbitration agreement. The following thoughts give some guidelines as to whether such path should be pursued or not:

Many international institutions (such as the International Chamber of Commerce [ICC] or the Swiss Chambers of Commerce) provide widely recognized, transparent and flexible sets of rules that cater for the specific issues of transnational litigation. The parties are free to either opt for such set or to define themselves the procedural rules to be applied; combinations are possible as well. Thus, the parties have the comfort that no surprising or unfair rules will be applicable.

The parties are to a large degree free to choose the arbitrators who will sit on and decide the case. This way they can ensure that the single arbitrator or the arbitration panel disposes of the legal, lingual and/or technical understanding, expertise and experience required in the specific instance. This regularly improves the quality of the proceedings as well as of the award.

One of the major assets of arbitration is the (relatively) short duration of the proceedings and the limited means of recourse against the award. However, a word of caution is directed to the wise: Should one of the parties opt to delay the proceedings, moving smoothly forward will not be easy for the arbitrator(s) and the other party.

Speaking of the disadvantages of arbitration, there is the risk of high costs and where the losing party refuses to honour the award, recourse to the official courts in order to seek enforcement will be required. This is also usually true for interim measures.

Still, the advantages clearly outweigh the drawbacks, making arbitration a very valid option for the settlement of international (and to a lesser degree also national) disputes.

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WHO WE ARE

As a medium sized law firm we offer timely and reliable assistance in a wide range of practice areas. Understanding the business interests of our clients as well as analyzing and providing efficient solutions for complex legal issues constitute our core competencies.

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