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SPOTLIGHT

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The bank as judge? More restrictions on heirs' requests for information

After the death of a testator, the ascertainment of the estate's assets is often a central concern of the heirs. Accordingly, banks and other agents of the testator are often confronted with requests for information from heirs. A new decision by the Federal Supreme Court considerably restricts the heirs' rights to information based on contract. This is likely to result in additional costs for the agents concerned.

Legal and contractual rights to information under Swiss law

Heirs have various instruments at their disposal to obtain information from third parties on the (financial) affairs of the testator. For the sake of simplicity, this article refers to banks. Asset managers, trustees or tax advisors are in a similar situation, though.

On the one hand, the heirs may have a right to information under the applicable law of succession. Under Swiss law for instance, such right requires that the requested information is necessary to safeguard claims under the law of succession (e.g. to calculate the compulsory portions). A claim to information under the law of succession may exist for example, if the bank is aware of asset flows from the testator to third parties that violate the compulsory portions.

On the other hand, the right to information under the law of contract must be taken into account. Under Swiss law, the client has, in particular, a comprehensive right to information under mandate agreements. This right enables the client to monitor the proper performance of the contract by the agent. Since the heirs succeed into the contractual position of the testator, his contractual rights to information are transferred to them. Previously, a bank could therefore limit itself to verifying whether the requesting party was actually an heir of its contractual partner before providing information. Even in cross-border relationships this is relatively easy to establish by means of documents issued by the competent authorities (e.g. certificate of inheritance). A further legal interest of the heirs in the information requested was not required until now. The contractual right to information was only limited insofar as information of a highly personal nature was concerned. With the proof of the heirs' status, heirs usually received account opening documents, account statements and account closing documents from banks based on the right to information under contract law. Correspondence between the testator and the bank (e.g. payment orders) could also be disclosed on this basis.

International clients

The distinction between rights to information under the applicable law of succession and the applicable law of contract is particularly relevant

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in cross-border cases (e.g. testator with a foreign domicile). The right to information under the law of succession is determined by the applicable law of succession. Under the Swiss conflict of law rules, the law of succession of the last domicile of the testator is generally applicable in this respect. In addition, the courts at the testator's last domicile are usually competent for actions for information under the law of succession. If, for example, a German citizen dies in Germany, the rights to information under the law of succession must also be assessed under German law of succession with regard to an account in Switzerland. Moreover, they are subject to German jurisdiction. On the other hand, the contractual relationship with the Swiss bank, and the rights to information derived from this relationship, are generally subject to Swiss law. Furthermore, the Swiss courts at the seat of the bank regularly have jurisdiction to judge disputes arising from this relationship.

New decision of the Federal Supreme Court

In a new, well-founded decision, the Federal Supreme Court has now considerably restricted the scope of the heirs' right to information under Swiss law of contract and adapted it to the right to information under the applicable law of succession (4A_522/2018 of 18 July 2019). In practice, the decision is likely to pose difficult delimitation issues for banks.

Specifically, the decision dealt with the question of whether the bank must disclose to the heirs the identity (known to the bank) of a recipient of a large payment made by the testator during his lifetime. The Federal Supreme Court held that the heirs' inherited contractual right to information does not go as far as the testator's right to information. Based on the right to information under Swiss law of contract, the heirs are, therefore, only entitled to information regarding the testator's transactions during his lifetime in two situations: First, if their statutory inheritance claims could be infringed under the applicable domestic or foreign law of succession (e.g. compulsory portion or right to compensation for lifetime benefits to co-heirs). Second, if the provision of information is necessary to verify the due performance of the contract by the bank. Otherwise, the testator's right to privacy takes precedence, irrespective of whether or not he has expressly requested the bank to maintain secrecy.

Difficult implementation in practice

In practice, this can pose difficult questions for a bank: How can it assess whether the information requested from the heirs on a contractual basis is covered by one of the two permissible exceptions (infringement of inheritance rights/control of contract performance)?

This is particularly demanding in the first case and requires an assessment as to whether the heirs' claims under the law of succession could be infringed and whether the information requested may prevent such infringement. Must the bank itself examine whether the heirs requesting information could bring an action for reduction against third parties or whether the will contains a dispensation for compensation? Especially where a foreign law of succession is applied, a Swiss bank cannot answer these questions – which are generally decided by the courts – without considerable effort. The restriction of the contractual right to information (under Swiss law) by additional requirements of a (potentially foreign) law of succession complicates the situation considerably, particularly in the case of foreign estates.

Conclusion

The risk of violating banking secrecy by providing information has probably increased with the new decision of the Federal Supreme Court. In contrast to other agents bound by professional secrecy such as lawyers or physicians, banks cannot be exempted from banking secrecy by the authorities if their right to disclose information is unclear. In cases of doubt, only a court ruling can clarify the right of the heir to information. This is neither satisfactory for banks nor for heirs.

Against the background of this new Federal Supreme Court ruling, making all bank statements and correspondence accessible to heirs requesting information appears to be a delicate matter for a Swiss bank. Wherever possible, banks should seek to obtain a secrecy-waiver from future testators as regards their legal heirs.

Furthermore, any potential testator will be well advised to consider the consequences of the decision. A testator who wishes to facilitate an amicable, transparent division of the estate may have to explicitly authorise his bank to provide his heirs with comprehensive information.