Frozen Bank Account – What Next?

By Dr. Timo Fenner
Attorney at law, MLaw UZH
Neupert Vuille Partners
Zollikon-Zurich

and Dr. André Terlinden
Attorney at law, LL.M.
Neupert Vuille Partners
Zollikon-Zurich

1. Background

In recent years, not least in the course of implementing the 'white money strategy', the freezing of bank accounts has frequently given rise to legal disputes between bank customers and the bank. An account can be frozen for a variety of reasons, supported by various provisions of law. The freezing of accounts is either initiated by the bank or by the authorities, and then facilitated by the bank. The latter could encompass, for example, the freezing of criminal assets. In this case, law enforcement authorities order accounts to be frozen to recover funds from (presumably) criminal origins. With this compulsory measure, the customer's account (bank balance) is seized (seizure of account). An account can also be frozen on the order of tax authorities (securing assets in the context of tax debt) or by the competent court for arrest proceedings (the attachment of assets to secure outstanding debt).

This must be distinguished from the freezing of bank accounts by the banks themselves. Banks will freeze accounts particularly in the event of possible violations of the Anti-Money Laundering Act (AMLA respectively GwG: Geldwäschereigesetz) or due to uncertainties regarding civil law claims on the account in question. When a bank account is frozen due to a notification in accordance with Art. 9 AMLA, it concerns possible violations in connection with the criminal offence of money laundering, namely also the predicate offences under criminal law, whereby qualified tax offences have been qualified as predicate offences to money laundering since 1st January 2016. The bank can also refer to the general banking clause (Art. 3 paragraph. 2 lit. c BankG). In accordance with this, the bank is not advised to engage in any unlawful or immoral transactions. A transaction can be unlawful or immoral if it violates Swiss statutory regulations or mandatory foreign law, so for example foreign tax legislation and if the legal transaction in question is perceived as immoral from a Swiss point of view. Accounts may be frozen for compliance reasons to (supposedly) protect the customer if the bank suspects that a customer could be the victim of fraudulent activities (phishing, etc.), is being blackmailed or various unusual transactions have been carried out with foreign banks.

The following article concentrates mainly on accounts which have been frozen by the bank's initiative. From the bank customer's point of view, the focus is on the question of how to proceed (legally) against such an arranged freezing of an account.

2. Legal basis of bank contracts

The contractual relationship (current account and custody account) between the bank customer and the bank are governed on the one hand by the provisions of mandate law (Art. 394 ff. OR: Swiss Code of Obligations) and on the other hand those of the law on deposit agreements (Art. 472 ff. CO). The bank customer is the client or applicant; the bank is the agent or custodian.

In addition to the above-mentioned provisions of the Swiss Code of Obligations, any other contractual agreements (e.g. General Terms and Conditions of Business) may apply if they do not contradict mandatory law. A bank customer's claim of withdrawal of his assets is therefore based on these legal and contractual provisions.

In order to avoid legal disputes and the risk of criminal prosecution, several banks have begun to include rules in their general terms and conditions, according to which their customers must provide evidence of compliance with their tax liability for the transfer or handover of significant assets (declaration of tax compliance). It should be noted at this point that Swiss legislation

does not generally prohibit banks from doing business with (potentially) untaxed money, provided that there is no predicate offence of money laundering.

3. Bank's obligation to pay out

Both the mandate and deposit law provide for the client or applicant (bank customer) to have the right to access their bank balance at any time (Art. 404 CO: Client's right of revocation and termination against the agent and Art. 475 CO: the applicant's claim for repayment from the depositor). These provisions are mandatory, which is why the bank is obliged to pay out the assets to the bank customer at any time and cannot exclude these provisions, even through general terms and conditions. In light of this, bank customers are best advised not to be intimidated by contradicting provisions in terms and conditions.

4. Limits to the obligation to pay out

In the case of an unlawful and immoral transaction, and in particular in the provisions of mandatory public law, the bank's obligation to pay out is limited. Regulatory or criminal law provisions stemming from public law, such as the Anti-Money Laundering Act (AMLA / GwG) or the Finma Anti-Money Laundering Ordinance (AMLO-Finma / GwV-Finma) regulations, take precedence over the clauses of a bank customer's right to access their account under private law, if the private law agreement contradicts the conventions of mandatory public law.

According to the AMLA and AMLO-Finma, the bank is obliged to identify the business partner. In particular, it must clarify the background of transactions if (1) from the bank's point of view such a transaction appears unusual (unless its legality is recognisable), (2) there are indications that the assets in question are connected with criminal activity according to Art. 260 no. 1 StGB (Criminal Code: participation in a criminal organisation) or Art. 305bis StGB (money laundering), (3) it originates from a crime or is subject to the disposition of a criminal organisation or (4) it is linked to terrorism financing (Art. 260quinquies Paragraph 1 of the Criminal Code) ("dubious business relationship"). Tax fraud is applicable in case of a qualified tax offence in connection with a money laundering offence (use of a forged, falsified or untrue document for tax evasion purposes), if the value of the tax evaded is more than CHF 300,000 per tax period. In other words, tax fraud in connection with tax evasion of less than CHF 300,000 per tax period cannot be assumed to be a qualified tax offence.

If the bank knows or has reasonable doubt that the assets involved in a future or existing business relationship may have an impermissible background in the aforementioned sense, it must immediately notify the reporting office (MROS at the Federal Police Office). However, if there are no indications of the existence of a relevant predicate offence in the aforementioned sense, the bank is neither obliged to notify (Art. 9 AMLA) nor has the right to notify (Art. 305ter StGB), nor does a "dubious business relationship" (Art. 31 f. AMLO-Finma) exist.

If the criteria for notifying the reporting office are met, the bank must freeze the associated assets as soon as the reporting office informs that it is forwarding a report to a law enforcement authority. The account will remain frozen by the bank until the notification from the prosecuting authority arrives, but for a maximum of 5 working days from the point in time at which the reporting office informed it was forwarding a report. After 5 days, the freezing of an account becomes obsolete and unjustified unless the law enforcement authorities orders an extension.

5. Procedural approach in the event of a frozen bank account

If a bank unjustifiably freezes a bank account, for example beyond the 5 days provided for in the AMLA, without the law enforcement authorities ordering the continuation of the freezing of the account, it violates its contractual obligations under the mandate and deposit agreement law. This provides the bank customer with a right to access their bank balance at any time. If the bank does not voluntarily comply with the bank customer's request to pay out or transfer assets, it will be legally obliged to release the assets and to pay any damages for non-performance.

Unless the law enforcement authorities have ordered an account to be frozen under the provisions of criminal procedure law, the account holder has to obtain the unfreezing of his bank account or the payment or transfer of his assets from the bank through private law and civil litigation. This takes place either with the submission of the conciliation request to the magistrate and subsequent filing of an action at the ordinary court or directly with the submission of the action to the Commercial Court, provided that the action takes place in a Canton with a Commercial Court (Zurich, St. Gallen, Bern and Aargau) and the amount in dispute exceeds CHF 30,000. The advantage of filing a lawsuit with the Commercial Court lies in particular in its commercial law expertise, the avoidance of a conciliation procedure and, in contrast to the ordinary courts, the above-average dispute resolution within the scope of a settlement.

fenner@nplaw.ch
terlinden@nplaw.ch
www.nplaw.ch