

## Joint accounts

# Conflicting instructions : who takes priority ?

Par Teymour Brander le 27 April 2022

How should a bank react to contradictory instructions issued within hours of each other by the joint account holders ? In whose hands must it act ? In ruling 4A\_630/2020, the Swiss Federal Supreme Court clarifies the rights and obligations of a bank receiving contradictory transfer orders relating to a joint account.

A father and son opened a joint account with a bank, on which each had individual signing authority. The assets in this account amount to around EUR 20,000,000.

On the morning of June 5, 2013, the father instructed the bank to transfer EUR 18,000,000 to an account held by himself and his wife. Deeming these instructions “unusual”, the bank immediately informed the son of his father’s order. In response, the son instructed the bank to transfer all available assets to an account held solely by him. Noting that it was unable to carry out these two contradictory orders, the bank did not act on any of them, and asked the father and son to provide it with clear joint instructions.

In a conciliation petition filed the following day – June 6, 2013 – the son brought an action against the bank to enforce his transfer order. On July 2, 2013, the father filed a lawsuit against the bank for EUR 18,000,000.

The question at the heart of this case is in which hands the bank should pay. In accordance with the adage “first come, first served”, does the father have priority ? As soon as legal proceedings have been instituted, can the bank only discharge its obligations to the son ? The two cantonal courts ruled in opposite directions, first in favor of the father, then in favor of the son.

The Federal Court begins with a theoretical reminder of the banking relationship in question. The disputed account is a joint account, i.e. a contract with a mixed character between a deposit and a mandate. The joint account is the main case of application of the regime of active solidarity (art. 150 CO). Each account holder is authorized to dispose of the entire account balance alone (art. 150 para. 1 CO), and the bank is liable to all joint account holders if it transfers the balance to just one of them (art. 150 para. 2 CO).

Art. 150 para. 3 of the Swiss Code of Obligations – the interpretation of which will determine the outcome of this dispute – settles the question of which joint and several creditor the debtor discharges : “the debtor has the choice of paying to one or other of the joint and several

creditors, as long as he has not been notified by the proceedings of one of them". The Federal Court clarifies that the term "pursuit" (rechtlich belangen) covers both (i) pursuit within the meaning of the LP and (ii) legal action. In the remainder of this article, we shall retain this general terminology of "pursuit".

In view of these considerations, the following two cases should be distinguished :

No legal action has (yet) been taken : The bank has a right of option under art. 150 para. 3 CO and may freely follow either of the instructions, without incurring liability towards the second holder. The Swiss Federal Supreme Court has thus settled a doctrinal controversy by confirming that the bank is not obliged to carry out the instructions given first.

A lawsuit has been filed : from now on, the bank can only free itself by executing in the hands of the holder who is "suing" it. The bank thus loses its free choice of creditor. The holder who first "pursues" the bank benefits from the priority granted by art. 150 al. 3 CO.

Let's return to the case in point. Until the son took action against the bank, the latter was free to choose the creditor. As soon as the request for conciliation was filed – i.e. the day after the disputed instructions were given – the bank lost this freedom of choice and was thus obliged to perform in the hands of the son. The Federal Court therefore confirms the decision of the Geneva Court of Justice ordering the bank to execute the son's transfer order.

The Federal Court provides welcome clarification on the rights and obligations of a bank receiving contradictory orders relating to a joint account.

In our opinion, however, this ruling does not fully clarify the issue. It should be remembered that the bank has a duty of information and diligence towards all holders of the relationship – the reason given by the bank in casu for not immediately executing the father's order and informing the son. What if the bank had carried out the father's order – thereby transferring almost all the assets in the joint account – without informing the son first ? In this respect, the Geneva Court of Justice states only that the fact that the bank informed the son "does not appear to be open to criticism, given the size of the amount to be transferred and its duty to inform and exercise due diligence". The Swiss Federal Supreme Court does not dwell on the practical implementation of the bank's right of option in the light of its duty of information and diligence towards all account holders.

In practice, in the event of conflicting instructions, co-holder A who wishes to prevent the bank from executing co-holder B's first order and benefit from priority has no choice but to "sue" the bank first – as the son did in the judgment under review.

In view of the lingering doubts about the bank's duty to inform, and the "pursuit" race induced by art. 150 para. 3 CO, we believe it would be wise to adapt the contractual documentation applicable to joint accounts. As art. 150 para. 3 CO is dispositive in nature, the parties to the joint account contract can freely arrange their respective rights and obligations in the event of conflicting instructions.

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