

Bank failure

What protection is there for a foreign insurance company's deposits ?

Par Teymour Brander le 28 December 2023

Do accounts opened with a Swiss bank by a foreign insurance institution (in order to deposit the premium paid by each of its policyholders) benefit from the privileged treatment of deposits ? In ruling 5A_362/2023 of September 28, 2023, the Swiss Federal Supreme Court answered in the negative.

The facts are as follows. A Luxembourg insurance institution offers life insurance contracts. For each policy taken out, the insurance company opens an individual account with a bank to deposit the premium paid by the policyholder. These accounts are held solely by the insurance institution.

Between 2011 and 2014, the insurance company opens around 50 deposit accounts with a Swiss bank, using the procedure described above. Unfortunately, the bank was declared bankrupt in 2014. When filing its claims, the insurance company requested collocation privileges for each of its accounts (for a total of almost CHF 600,000). The liquidator only partially accepted this request, granting reimbursement of only CHF 100,000 as a preferential deposit. When the cantonal courts rejected the claim, the insurance company brought the matter before the Swiss Federal Supreme Court.

The question to be decided by the Federal Court is whether the insurance company can request collocation privilege (i.e. allocation to the second class of claims) for each of the accounts opened with the bank. This comes down to determining whether the claims arising from the disputed deposits fall into the category of privileged deposits under art. 37a para. 1 BL.

The Federal Court begins with a basic reminder of how depositor protection works. In principle, only the account holder is protected ; the beneficial owner cannot claim the collocation privilege, even if he or she is known to the bank. In other words, the holder of several accounts is only entitled to reimbursement as a privileged deposit up to the maximum amount of CHF 100,000, regardless of the possible separate identity of the beneficial owners of the accounts.

However, this principle of excluding the beneficial owner from the preferential claim is subject to an exception for the following two categories of claims (art. 37a para. 5 BL) : (i) claims of bank foundations recognized as pension funds (3rd pillar) and (ii) claims of vested benefits foundations recognized as vested benefits institutions (2nd pillar). These claims are considered to be deposits of each pension fund member or insured person, and are privileged up to a

maximum amount of CHF 100,000.

The legal question to be resolved is whether this exception under art. 37a para. 5 BL should be extended to disputed claims, i.e. deposits made in execution of insurance contracts subject to foreign law. On the basis of a historical and teleological interpretation, the Federal Court answered in the negative and dismissed the Luxembourg institution's appeal.

One point is particularly relevant to understanding the result reached by the Federal Supreme Court : claims arising from tied pension contracts concluded with Swiss insurance institutions do not benefit from the privilege under art. 37a para. 5 BL. According to the Federal Court, policyholders do not need this privilege, since they already benefit from a specific lien in the event of their insurer's bankruptcy (see art. 54a para. 2 ISA). This explains why art. 37a para. 5 BL is limited to the claims of the aforementioned banking and vested benefits foundations.

In conclusion, it should be noted that the Luxembourg institution nevertheless benefited from a collocation privilege of CHF 100,000 (for all its accounts), even though it could potentially have been entirely excluded from this regime as a foreign insurance company subject to prudential supervision (art. 42c al. 2 let. c OB). As this point was confirmed by the last cantonal instance, and as the Federal Court did not rule beyond the conclusions of the parties, the question was expressly left open.

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