

Suspension of a power of attorney over the account due to presumed limited mental competence on the part of the client

Topic: **Miscellaneous** Case number: **2017/24**

Suspecting limited mental competence on the part of the client, the bank informed the latter's fiduciary that it was no longer able to honour the power of attorney over the client's account. In addition, the bank asked the fiduciary, on the basis of Article 397a of the Swiss Code of Obligations, to notify the relevant adult protection authority. Shocked by this procedure, the client asked the bank for a statement of position and, at the same time, requested an opinion from the Ombudsman. Initially, the latter had to ask the client to wait for the bank's statement of position. He nevertheless took the opportunity to provide general information to the client about the background and content of the legal provision referred to by the bank. Shortly afterwards, the client sent the bank's statement of position received in the meantime to the Ombudsman. In its statement of position, the bank acknowledged having misjudged the situation and offered its most sincere apologies to the client along with compensation.

Outraged, a wealthy client contacted the Ombudsman to tell him that the power of attorney his fiduciary had long held over his account, had been suspended by the bank. The latter informed the client's fiduciary of this measure by letter, inviting him to announce this to the relevant adult and child protection authority (ACPA) pursuant to Article 397a of the Swiss Code of Obligations. To justify its initiative, the bank claimed it had every reason to believe, given the information it obtained from various people, that the client's mental competence was limited. In support of his request to the Ombudsman, the client provided a copy of the complaint letter previously sent to the bank management. He asked the Ombudsman to review the matter and offer advice. In his complaint to the bank, the client criticised the fact that the letter sent to his fiduciary was harmful to his reputation and a breach of data protection and banking secrecy. As a result, he demanded a detailed statement of position, subject to any other initiative.

In his response to the client, the Ombudsman told him that his outrage was completely understandable given the facts set out. He did ask the client to show some understanding however regarding the fact that, in his capacity as mediator, the Ombudsman could only form an opinion about a case and decide how to proceed once he had knowledge of the stance and arguments of each party regarding the subject of the dispute. He therefore asked the client to wait for the bank's statement of position and invited him to contact him again if he did not find the bank's response satisfactory. By way of additional information, the Ombudsman also explained that Article 397a of the Swiss Code of Obligations referred to by the bank actually entered into force on 1 January 2013 in the context of the revision of the adult protection legislation. This new provision stipulates that, within agency relationships, which also include banking relationships, the representative must notify the principal's adult protection authority if the latter suffers a lack of mental competence that is likely to be long-lasting, and that such an endeavour would be appropriate in terms of safeguarding the principal's interest. This provision provides for the protection of individuals requiring assistance.

A few days later, the client sent the Ombudsman a letter thanking him for the information and informing him that he had in the meantime received a statement of position from the bank and a

letter from the bank to his fiduciary in which the bank confirmed having now been able to determine the client's full and unrestricted mental competence. The bank stated that its first letter could be deemed null and void. In its response to the client, the bank explained in detail how it had come to misjudge the situation. It also offered its most sincere apologies for having sent the letter to his fiduciary. Finally, it declared its willingness to compensate the client for any fees charged by his fiduciary in relation to this misunderstanding. The client informed the Ombudsman that, although the bank's statement of position was only partly satisfying given the circumstances, he would accept it. The Ombudsman was therefore able to close the case.