LEGAL OPINION

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INTRODUCTION

The following legal analysis by Dr. Joachim Frick, an attorney with the Zurich office of the international law firm of Baker & McKenzie, explains how and to what extent individuals can protect their assets through the purchase of a life insurance policy from a Swiss life insurance company. This booklet provides an analysis of asset protection for policy holders in relation to the legal framework of Switzerland, with the relevant Swiss statutes translated in an annex. The laws applicable to asset protection through life insurance and the legal protection provided are addressed and discussed in detail.

ASSET PROTECTION CERTIFICATES: ASSET PROTECTION THROUGH SWISS LIFE INSURANCE POLICIES

You have asked me to analyze the following question:

"May the creditors of a person (the 'debtor') who are domiciled outside of Switzerland seize a life insurance policy that their debtor has purchased from a Swiss insurance company, based on a foreign judgment they have obtained against such debtor ?"

I would like to address the answer to this question as follows:

A. CONCLUSIONS

Based on the legal analysis as outlined in Section B, I have come to the following conclusions:

1. Where a person residing outside of Switzerland (hereinafter referred to as the "policy owner") purchases a life insurance policy from a Swiss insurance company and designates his spouse or his descendants as beneficiaries of such insurance policy, or irrevocably designates any other third party as beneficiary, **this insurance policy will be protected by Swiss law as against any debt collection procedures instituted by the creditors of the policy owner and will also not be included in any Swiss bankruptcy procedure in this regard. Even where a foreign judgment or court order expressly decrees the seizure of such policy, or its inclusion in the estate in bankruptcy, such an insurance policy may not be seized in Switzerland or included in the estate in bankruptcy.**

Creditors may only seize the policy, or have it included in the estate in bankruptcy, where the purchase of the insurance policy or the designation of the beneficiaries is considered as a fraudulent conveyance under Swiss law. This condition will be fulfilled where the policy owner has designated the beneficiaries not more than one year before debt collection proceedings are initiated which eventually lead to a bankruptcy decree against the policy owner or to the seizure of the policy owner's assets.

This condition will also be met where the beneficiary has been designated with the clear intent to damage creditors or to treat some creditors more favorably than others and the designation was made within five years from the date debt collection proceedings resulting in a bankruptcy decree or in the seizure of assets were initiated against the policy holder. Such an intent to defraud, however, cannot be proved where the beneficiaries were designated at a time the policy owner was solvent and no creditors had yet asserted any claims against the policy owner which could have rendered him insolvent.

Where the policy owner has designated his spouse or his descendants as beneficiaries of the insurance policy, the insurance policy will be protected from claims made by his creditors, irrespective of whether the designation is revocable or irrevocable. **The policy owner may therefore designate his spouse and/or his descendants as beneficiaries on a revocable basis and later revoke this designation prior to the expiration of the policy if at such time there are no threats from any creditors. At the expiry of the insurance policy the policy holder will be able to either collect the proceeds pursuant to the policy or roll them over into a new life insurance policy.**

2. The above conclusions are applicable to all life insurance policies which have been recognized by the supervisory authority, the Federal Agency for Private Insurance Matters ("Bundesamt für Privatversicherung"), *i.e.* also for life insurance policies linked to mutual funds and derivatives.

B. LEGAL ANALYSIS

1. The protection of life insurance policies in Swiss debt collection and bankruptcy proceedings

During the course of debt collection proceedings a creditor, in principle, may seize an insurance policy purchased by his debtor, or have such policy included in such debtor's estate in bankruptcy (Fritzsche/Walder, Schuldbetreibung und Konkurs nach schweizerischem Recht, Vol. I, Zürich 1984, p. 305 seq.). According to Art. 79 para. 1 of the Swiss Insurance Act, this will, in general, also be possible if the policy owner has designated a third party as beneficiary of the policy (Maurer, Schweizerisches Privatversicherungsrecht, 3rd. Ed., Bern 1995, p. 452 seq.; Jaeger/Roelli, Kommentar zum Schweizerischen Bundesgesetz über den Versicherungsvertrag, Bern 1933, N 14 seq. and Art. 82 VVG) as, according to this provision, the designation of the beneficiary will become null and void where the policy is seized by the policy owner's creditors, or where the policy owner falls into bankruptcy. According to the Swiss Insurance Act, a life insurance policy is, however, protected from the policy owner's creditors under the following conditions:

a) Irrevocable designation of a third party as beneficiary

If the policy owner has irrevocably designated a third party as beneficiary of a life insurance policy such policy may, according to Art. 79 para. 2 of the Swiss Insurance Act, not be seized by the policy owner's creditors (decision of the Federal Supreme Court, BGE 112 II 157; Maurer, supra, p. 453; B. Wiret, Privatversicherungsrecht, 3 Ed., Zürich 1991, p. 210 and 212). On pages 160 and 161 of the cited decision, the Federal Supreme Court held the following with regard to the effects of an irrevocable designation of a third party beneficiary:

«En cas d'exécution forcée contre le preneur d'assurance, si la désignation du bénéficiaire est irrévocable, il n'y a, dans le patrimoine du preneur, ni créance d'assurance, ni droit de faire naître la

condition résolutoire à laquelle est soumis, en règle générale, le droit du bénéficiaire. Les créanciers du preneur ne peuvent donc rien faire saisir, inventorier ni réaliser. C'est ce qu'exprime l'Art. 79 al. 2 LCA, aux termes duquel, si le preneur d'assurance avait renoncé à son droit de révoquer la désignation du bénéficiaire, le droit à l'assurance qui découle de cette désignation n'est pas soumis à l'exécution forcée au profit des créanciers du preneur».

Translation: *"In case of enforcement measures against the policy owner, if the designation of the beneficiary is irrevocable, there is in the estate of the policy owner no insurance claim and the policy owner has no right to revoke the beneficiary's right as normally would be the case. The creditors of the policy owner may, therefore, not seize, have listed or auction off [an insurance policy]. This principle is expressed in Art. 79 para. 2 Swiss Insurance Act according to which, if the policy owner has waived his or her right to revoke the designation of policy emanating from such designation may not be seized by the policy owner's creditors."*

According to Art. 77 para. 2 of the Swiss Insurance Act, the designation of a third party as beneficiary will only be considered to be irrevocable if the policy owner has waived his or her right to revoke the designation in writing and the policy is physically handed over to the beneficiary (BGE 85 III 58; Maurer, supra, p. 453; Nünlist, Wegleitung zum neuen Schuldbetreibungs- und Konkursrecht, 4 ad, Bern 1997, p. 112). By signing the relevant declaration and handing the insurance policy over to the beneficiary, the policy owner will meet these requirements.

b) Designation of spouse and/or descendants as beneficiaries

If the policy owner has designated his spouse and/or his descendants as beneficiaries of the insurance policy in question, such insurance policy may, according to Art. 80 of the Swiss Insurance Act, not be seized by his or her creditors (Wiret, supra, p. 214; Amonn/Gasser, Grundriss des Schuldbetreibungs- und Konkursrechtes, 6 Ed., Bern 1997, p. 172 seq.; Jaeger/Roelli, supra, N 46 ad Art. 80 VVG; BGE 59 III 203), unless the policy owner has explicitly granted a security interest in such policy to a creditor (Carron, La loi fédérale sur le contract de l'assurance, Freiburg 1997, p. 169). The designation of the spouse and/or descendants as beneficiaries is not subject to specific formal requirements (Wiret, supra, p. 209) and may be part, for instance, of an "Asset Protection Certificate".

Regarding Art. 80 and 81 of the Swiss Insurance Act, the Federal Supreme Court held in BGE 105 III 133 the following:

„Art. 80 und 81 VVG sehen zugunsten des Ehegatten und der Nachkommen des Versicherungsnehmers, falls diese Begünstigte aus einem Lebensversicherungsvertrag sind, folgende Sonderregelung vor: Die Begünstigung erlischt nicht mit der Konkurseröffnung über den Versicherungsnehmer, wie dies nach Art. 79 Abs. 1 VVG sonst grundsätzlich der Fall wäre. Der Versicherungsanspruch ist nach Art. 80 VVG der Zwangsvollstreckung entzogen, und die Begünstigten treten nach Art. 81 VVG, sofern sie dies nicht ausdrücklich ablehnen, mit dem Zeitpunkt der Konkurseröffnung an Stelle des Versicherungsnehmers in die Rechte und Pflichten aus dem Versicherungsvertrag ein. Selbstverständlich werden dadurch die Pfandrechte Dritter am Versicherungsanspruch nicht berührt (Art. 80 VVG)".

Translation: *"Art. 80 and 81 of the Swiss Insurance Act provide for a special rule where the spouse and the descendants of the policy owner are beneficiaries of an insurance policy. The designation as beneficiary may no longer be revoked when the policy owner is declared bankrupt as would normally be the case in accordance with Art. 79 para. 1 of the Swiss Insurance Act. Pursuant to Art. 80 of the Swiss Insurance Act the claim against the insurer may not be subject to enforcement*

measures and the beneficiaries at the time when bankruptcy is declared will enter into the rights and obligations of the insurance agreement replacing the policy owner (pursuant to Art. 81 of the Act), unless they expressly decline such transfer of the agreement. Naturally, eventual liens of third parties relating to the insurance policy will not be concerned thereby (Art. 80 of the Swiss Insurance Act).”

In contrast to the designation of another third party as beneficiary, it is irrelevant, in case of a designation of spouse and/or descendants, whether such designation is irrevocable or revocable, so that the insurance policy will also be protected from the policy owner’s creditors if the designation of the spouse and/or descendants is revocable (Fritzsche/Walder, supra, Vol. I, p. 306; Jaeger/Roelli, supra, N 46 ad Art. 79/80 VVG). If the policy owner falls into bankruptcy, or if the debt collection office certifies to his creditors after a seizure that the assets seized do not cover the policy owner’s debts, any spouse and/or descendants who are beneficiaries of the policy will, according to Art. 81 of the Swiss Insurance Act, be assigned all the rights and duties of the policy owner under the relevant insurance policy (cf. BGE 81 III 142).

c) Rules on fraudulent conveyance

However, according to Art. 82 of the Swiss Insurance Act, creditors of a policy owner may seize the policy even in the above cases, if they can prove that the irrevocable designation of a third party or the designation of the spouse and/or descendants as beneficiaries is to be viewed as a fraudulent conveyance within the meaning of Art. 285 seq. of the Swiss Debt Collection and Bankruptcy Act (cf. BGE 81 III 143; Jaeger/Roelli, supra, N 13 seq. ad Art. 82, N 53 seq. ad Art. 79/80 VVG; Wiret, supra, p. 216). The purchase of an insurance policy and the designation of beneficiaries would be considered as a voidable preference under the Swiss fraudulent conveyance rules in the following cases:

aa) Designation made within one year before bankruptcy or seizure

According to Art. 286 of the Swiss Debt Collection and Bankruptcy Act, gifts or gratuitous settlements made by a debtor are a voidable preference where the debtor is declared bankrupt or where the debtor’s assets are seized within one year after the initial transaction was made (T. Sprecher/R. Jetzer, Einführung in das neue Schuldbetreibungs- und Konkursrecht, Zürich 1997, p. 62 seq.; Fritzsche/Walder, supra, p. 549 seq.). In calculating the one year period, the duration of some specific time periods will be added (*i.e.*: the duration of preceding composition proceedings; the duration of a stay of opening a bankruptcy; in proceedings to liquidate an estate the period between the date of decease and the liquidation order and the duration of preceding enforcement proceedings; cf. Art. 288a of the Swiss Debt Collection and Bankruptcy Act and Froidevaux, Loi sur la poursuite des dettes et la faillite, modifications au 1er janvier 1997, Bern 1997, p. 227). As the gratuitous designation of a third party as beneficiary under an insurance policy can be regarded as a gratuitous transfer to such third party, such designation may, therefore, be avoided by the creditors if it was effected within this one year period (cf. Gaugler, Die paulianische Anfechtung unter besonderer Berücksichtigung der Lebensversicherung, Vol. 2, Basel 1945, p. 564; Amonn/Gasser, supra, p. 429).

bb) Designation made with the intent to damage creditors

According to Art. 288 of the Swiss Debt Collection and Bankruptcy Act, all transactions are voidable which the debtor carried out during the five years prior to the seizure of assets or the opening of bankruptcy proceedings with the

intention, apparent to the other party, of putting his creditors at a disadvantage or of favoring certain of his creditors to the disadvantage of others (Fritzsche/Walder, supra, Vol. II, p. 558 seq.; Amonn/Gasser, supra, p. 431 seq.; BGE 101 III 94; BGE 99 III 98). The five years period may be extended by the periods of Art. 288a mentioned above, aa). If the designation of the spouse and/or the descendants or of a third party was made with the specific intent of the debtor to damage creditors and the beneficiaries knew of this intent, the designation is thus also voidable (H. Gaugler, supra, p. 542). In order to avoid the transfer, the creditors concerned need to prove the intent as well as the beneficiary's knowledge. It is, however, not sufficient for the proof of such intent to demonstrate that the designation took place at a time at which the policy owner was - due to his professional activities or his investments - aware of certain risks as long as the policy owner's assets still covered all his debts and he could not foresee an insolvency (Fritzsche/Walder, supra, Vol. II, p. 561 seq.; Amonn/Gasser, supra, p. 431 seq.; cf. BGE 43 III 249; BGE 83 III 85).

2. Protection of foreigners having purchased Swiss life insurance policies

a) Debt collection and bankruptcy procedures against foreigners in Switzerland

In Switzerland, a creditor may only institute a debt collection procedure against a foreign debtor if he can first attach assets of such debtor in Switzerland. According to Art. 271 of the Swiss Debt Collection and Bankruptcy Act, a creditor may obtain such an attachment if the creditor can establish a prima facie case of his claim and prove that the debtor concerned has no domicile in Switzerland, provided the claim has a sufficient connection with Switzerland or is based on an enforceable court judgment or on a recognition of debt (cf. Art. 271 Sect. 2 Para. 4 of the Swiss Debt Collection and Bankruptcy Act; Amonn/Gasser, supra. p. 409 seq.; Froidevaux, supra, p. 213; Siegen/Buschor, supra, p. 169).

Such prima facie case may normally be established easily, particularly where the creditor has obtained a judgment abroad which confirms his claim (Sprecher/Jetzer, supra, p. 57). According to Art. 279 of the Swiss Debt Collection and Bankruptcy Act, the creditor must then within 10 days file a writ of payment against the debtor. If the debtor opposes such writ, the creditor must institute an ordinary civil procedure against the debtor, or, where he has already obtained a judgment in a foreign country, file a petition for the execution of such judgment in Switzerland. In accordance with Art. 25 of the Federal Act on Private International Law (IPRG), the execution will be granted, if the foreign court concerned had jurisdiction from a Swiss perspective, the judgment cannot be appealed in the country concerned and the foreign court has not violated fundamental principles of law or due process (Berti, in: Kommentar zum Schweizerischen Privatrecht; Basel 1996, N 28 seq. ad Art. 25 IPRG; Volken, IPRG Kommentar, Zürich 1993, N 6 seq. ad Art. 25 IPRG and N 6 seq. ad Art. 28 IPRG). An even more limited review of the foreign judgment will occur where the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (the "Convention") is applicable because the judgment has been rendered in a country which has signed the Lugano Convention. A foreign judgment may, therefore, in principle, be enforced in Switzerland and could serve as basis for debt collection proceedings against a foreign resident, if it meets these conditions.

However, where a foreigner has been declared bankrupt in the state of his domicile, the creditors will not be required to attach his assets and seek the enforcement of a judgment they have obtained against him: in such case they may file a petition for the recognition of the foreign bankruptcy decree in Switzerland. According to Art. 166 IPRG, a foreign bankruptcy decree, which was rendered in the state of domicile of the debtor, will be recognized in Switzerland

where such decree cannot be appealed in the country of its origin, does not violate fundamental principles of law and due process and the country concerned does recognize Swiss bankruptcy decrees (Berti, supra, N 14 seq. ad Art. 166 IPRG; Volken, supra, N 9 seq. ad Art. 166 IPRG). In such a case, all assets of the debtor which are located in Switzerland will be auctioned off and the proceeds be distributed to the creditors in accordance with Swiss bankruptcy rules, the remaining balance eventually being remitted to the foreign bankruptcy estate (Art. 170 and 173 IPRG; Berti, supra, N 4 ad Art. 170 IPRG; Volken, supra, N 1 seq. ad Art. 170 IPRG; Zurich Appellate Court, decision Nr. 27 in SJZ 87 (1991), p. 191 seq.).

b) Swiss insurance policies in a debt collection or bankruptcy procedure against the foreign debtor

According to Art. 275 of the Swiss Debt Collection and Bankruptcy Act, only assets which a creditor can seize in a debt collection procedure can be attached (Amonn/Gasser, supra, p. 407). As this principle applies also to foreign debtors (BGE 79 III 72), a Swiss insurance policy purchased by a foreigner is protected under the conditions set forth above in para. 1 of this letter (Jaeger/Roelli, supra, N 78 ad Art. 79/80 VVG). Therefore, if creditors do not file for an attachment but rather for the recognition of a foreign bankruptcy decree, the insurance policy is nevertheless protected. According to Art. 170 IPRG, the debtor's assets in Switzerland will be auctioned off for the benefit of his creditors in accordance with *Swiss* bankruptcy rules (Berti, supra, N 4 and N 6 ad Art. 170 IPRG; Volken, supra, N 1 seq. ad Art. 170 IPRG). The rules ad Art. 79 Sect. 2 and Art. 80 VVG described above are part of these rules (Ryser, Der Versicherungsvertrag im internationalen Privatrecht, Bern 1957, p. 134; Jaeger/Roelli, N 78 of Art. 79/80 VVG). As debt collection and bankruptcy procedures in Switzerland, therefore, are always based only on Swiss bankruptcy rules, and these rules include Art. 79 Sect. 2 and Art. 80 VVG, life insurance policies will be protected in accordance with Swiss law in such procedures, even where the debt collection or bankruptcy law at the debtor's domicile would not afford him such protection. In particular, according to Art. 171 IPRG, only the Swiss rules on fraudulent conveyance apply, so that the designation of beneficiaries cannot be avoided by the creditors unless they prove that the conditions for fraudulent conveyance described above are met, even if such purchase or designation were a voidable preference under the fraudulent conveyance rules applicable at the debtor's domicile (cf. Berti, supra, N 11 ad Art. 171 IPRG).

Therefore, the creditors of a person residing outside of Switzerland may in Switzerland not seize or include in the estate in bankruptcy any life insurance policies which are protected under Swiss law even if they have a judgment or a bankruptcy decree which is enforceable in Switzerland, unless they can prove that the designation of the beneficiaries of the insurance policy is a voidable preference under Swiss fraudulent conveyance rules.

As the above rules apply to assets located in Switzerland only, it is important to note that the rights under an insurance contract between a foreigner and a Swiss insurance company will, according to Swiss law, be deemed to be located at the domicile of the Swiss insurance company (BGE 79 II 199 seq.; Guldener, Das internationale und interkantonale Zivilprozessrecht der Schweiz, Zürich 1951, p. 186). However, if the policy owner's and the beneficiaries' rights are embodied in a policy which must be considered as a security, a creditor could claim that such security could be seized in accordance with the debt collection and bankruptcy rules of the country in which such security is deposited as securities normally are subject to the debt collection and bankruptcy law of the country in which they are deposited. This problem, however, can be avoided if the insurance policy is deposited in Switzerland.

c) Revocation of a beneficiary designation by order of a foreign judge?

A foreign judge or court may order a policy owner to revoke a past beneficiary designation in order to include the respective assets in the foreign bankruptcy estate. To comply with such order or judgment, the policy owner may inform the insurer that he revokes the prior beneficiary designation. The question arises whether the insurer under Swiss law has to comply with such instruction by the policy owner which was forced upon the policy owner by a foreign judge or court.

In case of an irrevocable designation of a third party under Art. 79 sect. 2 VVG, an insurer will not comply with the instruction by the policy owner since this would contradict the irrevocability of the beneficiary designation.

In case of the revocable designation of the spouse or descendants, the spouse and descendants of a policy owner succeed into the rights and obligations arising from the insurance contract automatically in the moment when the policy owner is declared bankrupt, unless they expressly object to such succession (Art. 81 Sect. 1 VVG). The spouse or descendents have to inform the insurer accordingly (Art 81 Sect. 2 VVG). Therefore, if the foreign policy owner has been declared bankrupt previously and later instructs the insurer that the beneficiary designation is revoked, the insurer will refuse to comply with such instruction since at this time the rights and obligations arising from the insurance policy were already assigned to the beneficiary. In this context, it is important to make sure that the insurer in fact knows about the foreign bankruptcy decree and that the beneficiaries inform the insurer of their succession under Art. 81 Sect. 2 VVG. Moreover, if an insurer receives a letter from the policy owner revoking the beneficiary designation, the insurer may come to the conclusion that the instruction received from the policy owner does not express the policy owner's true intent and was forced upon him by the foreign judge or court. Under Art. 18 of the Swiss Code of Obligations (CO), in case of a discrepancy between the real intent and the intent expressed in writing, a person who receives such writing and knows that it does not express the real intent normally has to follow the real intent and to ignore the writing which, as he knows, does not express the true intent. Although there is no court precedent dealing specifically with this situation, it is a general principle of Swiss law that a person who receives a written declaration of another person has to give such declaration the meaning which complies with the real intent of such person, if he knows such real intent. In other words, if an insurer receives a writing from a policy owner which, as he knows, does not reflect its real intent, it can and has to ignore such writing.

C. DISCLAIMER

The above analysis is limited to the laws of Switzerland and is not based on the review of specific documents signed by the policy holder. The possibility remains that a court in a particular case may come to different conclusions; no opinion is expressed herein with respect to the law of any other jurisdiction or with respect to possible changes in the applicable law.

Should you have any further questions concerning the issues addressed above, please do not hesitate to contact me.

Sincerely yours,

Dr. Joachim Frick

ANNEX: UNOFFICIAL TRANSLATION OF THE RELEVANT STATUTORY PROVISIONS

1. Art. 79 Swiss Insurance Act

"The designation of a beneficiary shall be null and void in case of seizure of the insurance policy and in case the insured person is declared bankrupt. It shall become fully enforceable again if the seizure is lifted or the decree of bankruptcy is revoked.

If the policy owner has waived his right to revoke a designation, then the insurance policy may not be seized by the policy owner's creditors."

2. Art. 80 Swiss Insurance Act

"If the policy owner has designated his spouse or his descendants as beneficiaries neither the insurance claim of the policy owner nor the one of the beneficiary may, subject to eventual liens, be seized by the creditors of the policy owner."