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Fraudulent bank orders

Comparison, a basic precaution ?

Par Célian Hirsch le 19 October 2022

Not comparing an order received by e-mail with one received by post ? A serious error, according to Federal Court ruling 4A_425/2021.

Following the death of a customer, a Swiss bank required the heirs to send the bank account instructions by post, in order to obtain the signatures of all the heirs.

In practice, the account manager has regular telephone conversations with the deceased's son. The latter tells him that the heirs must pay EUR 141,599.85 to the notary in charge of the estate. The order, signed by all the heirs, was first sent by e-mail, then by post.

Unfortunately, the postal mail was intercepted by fraudsters. They changed the bank details (IBAN and BIC) and corrected the name of one of the heirs, which had mistakenly appeared twice in the original. The manager does not check the order and executes it.

Shortly afterwards, the manager receives an unusual order, which he does not execute. The next day, the son informs him that the notary has still not received the expected amount. The fraud was thus discovered, but too late. The money sent to a Belgian bank had disappeared in Turkey.

The heirs took the bank to court, seeking reimbursement of the amount wrongly debited.

The Geneva Court of First Instance rejected their claim. It ruled that the bank manager could not have suspected that the order was fraudulent. In fact, not only had he discussed the matter with the son over the phone, but the characters used were exactly the same as those in the instruction received by e-mail, as were the phrases and words used. The layout was virtually identical, and the beneficiary of the transfer remained the notary.

On appeal by the heirs, the Court of Justice ruled that the bank had committed a serious error. According to its internal guidelines, it should have compared the two orders, both in accordance with the rules of good faith and because of the nature of the contract. Such a comparison, however brief, would have raised serious doubts as to the authenticity of the disputed order. The difference between the two orders was immediately obvious, which should have prompted the manager to contact one of the heirs.

After hearing the bank's appeal, the Swiss Federal Supreme Court began by pointing out that it

can only review an equitable decision with restraint (art. 4 CC). This is the case when the Court of Justice has assessed the degree of fault.

According to established case law, gross negligence consists in the violation of elementary rules of prudence which any reasonable person in the same circumstances would have been obliged to observe. The bank's fault is assessed according to the level of diligence that the other party was entitled to expect, in particular by virtue of the terms of the contract and professional practices.

Firstly, the bank argues that even if the verification had been carried out by the manager, this would not have made any difference, as the falsification of signatures was not detectable, and therefore the failure to comply with internal guidelines is not causally related to the occurrence of the damage.

The Federal Court countered that the Court of Justice had not criticized the bank for failing to examine the signatures, but rather for failing to compare the two orders. The bank's complaint is inadmissible.

Secondly, the bank maintains that the scanned order sent by e-mail could not be executed and therefore did not need to be examined. On the contrary, only the written order sent by post had to be examined, and no comparison between the two orders had to be made.

The Federal Court curtly rejected this argument :

"It is well known that fraud occurs when orders are sent by e-mail, but also by post. Comparing the two orders – scanned and written – is a matter of elementary prudence, all the more so when the transfer order concerns a large amount".

The bank's appeal was therefore dismissed.

This decision must be read in conjunction with two other rulings by the Swiss Federal Supreme Court. The first is 4A_386/2016, in which the bank had committed a serious error by failing to detect the unusual nature of an order given by e-mail (cdbf.ch/966/). The second is ATF 146 III 326, in which a trading company's gross negligence in executing orders transmitted by e-mail was denied, despite having been upheld by the Court of Justice (cdbf.ch/1150/).

In our opinion, the assessment of the bank's fault depends in particular on the mode of transmission of the order (cf. Liégeois Fabien/Hirsch Célian, Ordres bancaires frauduleux : discours de la méthode, in La Semaine judiciaire II, Doctrine, 2021, n° 4, p. 146).

When the order is transmitted not by a single channel, but by two, the bank must necessarily compare the two orders received, even if the contract does not stipulate this. Such an omission constitutes serious misconduct, as this ruling illustrates. Secondly, the judge must determine whether the comparison should give rise to serious doubt, which should lead the manager to contact the customer directly (the so-called call-back procedure).

In this case, the Federal Court did not have to review this second stage. Indeed, the bank did not seem to dispute that, as the Court found, "the difference [between the IBANs in the two orders] was detectable at first glance".

The lawyer might be tempted to expressly stipulate in the general terms and conditions that the bank is not required to compare orders transmitted via various channels. Such a clause would be tantamount to excluding its liability for gross negligence, which is not valid (cf. art. 100 al. 1 and 101 al. 3 CO ; Liégeois/Hirsch, op. cit., p. 131 ff).
