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Unauthorized transactions

What action should a client take against his bank ?

Par Célian Hirsch le 27 October 2022

If the bank executes unauthorized transactions, should the customer file a claim for enforcement or damages ? This depends on whether the fraud is internal or external, as stated by the Swiss Federal Supreme Court in ATF 149 III 105 (ruling 4A_407/2021).

The facts can be simplified as follows : a relationship manager, in charge of a bank's Turkish desk, carries out transactions (Forex operations, investments, transfers, etc.) on the accounts of several customers, without having received prior orders. In order to conceal these unauthorized transactions, the employee only gives customers summaries he has prepared himself, rather than official bank documents.

When the officer disappeared in Turkey, the fraud was discovered. Several customers took action against the bank to obtain repayment of the amounts debited without right (cf. 4A_126/2019 commented in cdbf.ch/1112 and ACJC/548/2021). In this case, the customer listed twelve transactions that he had not ordered, totalling EUR 4,550,958.30.

The customer brought a claim for payment before the Geneva Court of First Instance. His main action was for performance of the contract, claiming restitution of his assets, and his secondary action was for liability for non-performance of the contract, demanding compensation for his loss.

After nearly ten years of proceedings, the Court ordered the bank to pay the customer EUR 4,550,958.30 in return for the return of the securities in his portfolio, in accordance with the rules governing business management without a mandate (art. 419 ff CO).

Ruling on the bank's appeal and the customer's joint appeal, the Court of Justice largely upheld the judgment. However, it considered that the customer had an action for performance, not damages. This is because the funds deposited in a bank account opened in a customer's name are the property of the bank. To the extent of the sums deposited, the customer acquires a corresponding claim against the bank. However, the bank can only assert its own claim for reimbursement of advances and expenses incurred if it has been validly instructed to do so (cf. art. 402 CO). The Court sees no reason to distinguish this situation according to the origin of the unauthorized transaction, i.e. whether it originated from a bank employee or an unauthorized third party (ACJC/787/2021).

The bank is appealing against this ruling to the Swiss Federal Supreme Court. It argues that the

bank is liable when it executes unauthorized transactions. The customer only has a claim for damages. He would have to allege and prove his loss, which he would not have done in casu. Furthermore, compensation would have to be reduced on the grounds of concomitant fault on the part of the customer (a consideration that does not exist in an action for enforcement).

The qualification of the action is relevant, as it influences both the proof of damage and the possibility of invoking concomitant fault on the part of the customer.

The Swiss Federal Supreme Court states that “if the bank carries out banking transactions without instructions or without the customer’s consent, it is liable for the resulting damage to the customer according to the rules of business management without a mandate”.

He continues, without reference to case law or doctrine :

“[w]here the misappropriation of the customer’s assets is committed by a bank employee, and was therefore carried out without instructions and without the customer’s consent, the damage is suffered by the customer and the bank is liable in accordance with art. 398 para. 2 and art. 97 et seq. of the Swiss Code of Obligations”.

This is therefore an action for damages.

Finally, the Swiss Federal Supreme Court justifies the distinction between the situation in which an employee misappropriates a customer’s assets, and that in which the fraudulent orders emanate from third parties (cf. in particular ATF 146 III 121, commented in cdbf.ch/1135). Insofar as cases of lack of legitimacy are part of the risk inherent in the banking business, the risk is borne by the bank. This would justify the exceptional retention of an enforcement action, rather than an action for damages.

The Court of Justice was therefore wrong to uphold the action for performance. The customer has only a liability claim. That said, the Federal Supreme Court considers that the damage was indeed alleged by the customer. On the contrary, it was up to the bank to contest the losses claimed.

Finally, with regard to the customer’s concomitant fault, the Federal Court considers that the Court committed an “irreducible contradiction”. On the one hand, it admitted that the client had discovered that the agent had bought fund units from him, despite the absence of instructions. On the other hand, it held that the customer had no reason to expect unauthorized transactions on his account, despite this incident.

The Federal Court thus accepted the bank’s appeal and referred the case back to the Court to assess the customer’s concomitant fault in order to reduce his compensation.

The Federal Court’s reasoning excluding the enforcement action is not convincing. A customer who deposits assets with a bank has a claim against it. So does the lender who lends to the borrower. If the borrower’s money is stolen, whether by an employee or a third party, the borrower still owes the same amount to the creditor. The enforcement action cannot be converted into an action for damages on the basis of the bank’s internal entries, whether these are the result of internal or external fraud.

If the Federal Court does not reverse this unfortunate ruling, the customer should be very meticulous about alleging damage, and propose a forensic expert opinion to prove it. Although the Federal Court seems to have been lenient in this ruling, it has been much more severe in the past (cf. ATF 144 III 155, commented in cdbf.ch/1004 and 4A_202/2019, commented in cdbf.ch/1110).
