CENTRE DE DROIT
BANCAIRE ET FINANCIER

Fraudulent orders

Consequences of the client's lack of diligence

Par Philipp Fischer le 20 April 2023

The Federal Court's decision 4A_539/2021 of February 21, 2023 is a further illustration of the methodology applied by our High Court to apprehend the legal consequences of fraudulent orders. This ruling enshrines the principle that, when breaches of due diligence attributable to both the customer and the bank are the cause of fraudulent orders executed from the customer's account, the apportionment of damages must be determined by weighing up the respective faults.

The factual situation can be summarized as follows. In 1992, a customer opens a banking relationship with a bank. In 2013, the customer gives an order to his bank by e-mail – the usual means of communication – for an amount of EUR 200,000.

In the second half of October 2013, the bank followed up on four orders given from the customer's usual e-mail address, making transfers of EUR 60,000, EUR 200,000, USD 800,000 and USD 400,000 on October 15, 18, 24 and 31, 2013 respectively.

On October 22, 2013, the customer requested an account statement from his bank, which was sent the following day (October 23, 2013). One month later (November 29, 2013), the customer requested an updated account statement from his bank, again by e-mail. The customer then identified irregularities and immediately informed his bank. It turns out that the four aforementioned orders had been given by a fraudster, who had also falsified the October 23 account statement in order to conceal the first two fraudulent debits.

Following the bank's refusal to compensate the customer, the latter brought an action before the Ticino courts. The two Ticino cantonal courts partially ruled in the customer's favor, ordering repayment of the first two disputed transfers, but recognized a partial claim by the bank against the customer in respect of the last two transactions : the bank was liable for 2/5 of the loss, with the remaining 3/5 to be borne by the customer. The customer's compensation therefore amounts to EUR 260,000 (100 % of the first 2 transfers) and USD 480,000 (40 % of the last 2 transfers).

In response to an appeal by the customer, the Federal Supreme Court began by reiterating its "three-step" reasoning for determining who, between the bank and the customer, should bear the loss resulting from fraudulent orders (cf. ATF 146 III 121, commented in cdbf.ch/1135).

In this case, it is undisputed that the order was given "without mandate" (step 1) and that no

risk transfer clause was agreed (step 2). Thus, the only remaining issue is whether the bank has a claim against the customer, which it could set off against the customer's claim (step 3).

In this respect, the Court of Appeal of the Canton of Ticino had found that the customer had breached his duty of care insofar as he had neither noticed nor reported the irregularity of the extract received on October 23, 2013. However, the extract apparently showed clear signs of falsification (inconsistencies in numbers and font), which, according to the Federal Court, would have been easily identifiable by the customer if he had enlarged the document on his computer. Moreover, these irregularities were easily recognizable even by a financial novice, let alone by the customer, an expert in stock market investments. Had the customer exercised the due diligence required of him under the circumstances, detected these signs of falsification and informed the bank, the last two fraudulent orders would not have been executed.

As for the bank, the cantonal court noted that it had failed to comply with its internal directives, which require additional investigations in the case of orders exceeding a threshold of CHF 500,000. In addition, the unusual nature of both the content of the orders (unexpected real estate transactions, carried out in a continent – Asia – in which the customer had no economic interests, nor any particular ties) and the time at which they were carried out (real estate activities had been rare, and two debit orders a few days apart were unusual) should have alerted the bank.

In view of the above, the Federal Court concludes that the bank's omissions do not interrupt the causal link between the customer's fault and the damage suffered by the bank, which therefore has a claim (up to 60 % of the customer's claim – the Federal Court does not call into question the weighting carried out by the second cantonal court) that it can set off.

This ruling illustrates the importance of step 3 in the traditional "three-step" reasoning developed by the Federal Court in a series of rulings since December 2019 (ATF 146 III 121, commented in cdbf.ch/1135 ; ATF 146 III 326, commented in cdbf.ch/1150/ ; ATF 146 III 387, commented in cdbf.ch/1160/).

It is also surprising that the bank's General Terms and Conditions did not contain a risk transfer clause (idem : ATF 146 III 121 and ATF 146 III 387, but in contrast to the General Terms and Conditions on which ATF 146 III 326 is based), which is currently a market standard. However, such a clause (analyzed in step 2 of the Federal Court's methodology) does not apply if the bank is found to be guilty of serious misconduct, or if the bank is found to be guilty of minor misconduct (art. 100 para. 1 and 2 by analogy ; ATF 146 III 326, recital 6.1). In such a case, step 3, which is the subject of the judgment presented here, remains fully relevant.
