CENTRE DE DROIT
BANCAIRE ET FINANCIER

Accountability

No access to the file through intervention

Par Grégoire Geissbühler le 17 August 2023

In its ruling 4A_263/2022 of June 23, 2023, the Swiss Federal Supreme Court rejected an application for ancillary intervention by the heirs of a customer whose assets had allegedly been misappropriated, in proceedings pending between the bank and the current holder of the said assets. The Federal Court considers this to be a misuse of a procedural tool to exercise a substantive right of accountability.

E., who died in 2014, held an account with Bank B SA in Geneva. His nephew F. had power of attorney over this account. F. transferred E.'s assets to several accounts within the bank, ending up in the account of the Panamanian company A SA, whose beneficial owner is G., F.'s mother.

The heirs of the late E., i.e. his widow D. and their son C., allege that F. has misappropriated E.'s assets for his own benefit, thereby infringing their hereditary reserve. F., for his part, claims to be an instituted heir. The son, widow and nephew are opposing each other in several parallel civil proceedings.

F. and G. wished to dissolve A SA and transfer the funds held by this company to a new account in the name of G. The bank refused to act on A SA's instructions, for lack of sufficient information on the origin of the funds and their true ownership. A. SA served a summons to pay on the bank and then requested that the objection be discharged. The release, initially granted, was rejected by the Federal Court.

In the meantime, the bank had initiated an action to discharge the debt. The son and widow filed a motion for ancillary intervention, in order to act alongside the bank and take cognizance of the case. This request was accepted by the two cantonal courts, prompting A SA to appeal to the Federal Court.

The corollary of this intervention would be the disclosure of bank documents in the file, which would then be freely available to the son and widow. Such knowledge of the documents is by nature irreversible, and the Federal Court recognizes the existence of irreparable damage, a necessary condition for the admissibility of the appeal.

On the merits, the Federal Court noted that the purpose of the intervention was not so much to have the funds blocked pending clarification as to gain access to the documents produced. According to the established case law of the Federal Supreme Court, such access is a matter of

substantive law (rendering of an account within the meaning of art. 400 CO) and not of procedural law. The procedural avenues of provisional measures and future proof have already been deemed inappropriate, as they amount to deciding the merits of the dispute without a full examination.

The same fate must be reserved for access through a motion to intervene. As the judge limits himself to plausibility, the examination is insufficient to rule on a claim of substantive law.

The Federal Court therefore allowed the appeal, and declared the request for ancillary intervention inadmissible.

In a previous commentary, we explained that seeking information from banks forced litigants to be creative, in the absence of specific tools. Intervening in a dispute to retrieve information is a good example of this, even if it was not ultimately successful.

Strictly speaking, ancillary intervention requires only a plausible legal interest in the dispute being decided one way rather than the other (art. 74 CPC). Access to the case file is not specifically provided for, as art. 76 CPC merely states that “[t]he intervener may perform all procedural acts compatible with the status of the trial that are useful to the principal party whose case he supports […]”, and consulting the case file could be part of this.

However, the interveners have a definite economic interest, but a questionable legal interest, in the funds remaining on the bank’s books. Indeed, if the bank were to breach its obligations by handing over the funds to A SA, they could take legal action against it. The ancillary intervention route is therefore of dubious admissibility.

In itself, the reasoning could have stopped there. However, the heirs’ real aim – to gain access to the documents in order to fuel their own proceedings – is too apparent for the Federal Court to leave any doubt as to the admissibility of the method. It therefore took care to unequivocally bury the path of accessory intervention for access to documents.

For the time being, therefore, the barrier between substantive and procedural law remains intact. But creativity always breeds creativity, and other tools exist : denunciation of proceedings, appeal in cause or substitution of parties (which admittedly require an active role on the part of the defendant bank), or simple joinder of causes. Unless one accepts that these tools are inapplicable – and therefore that the mandate is an exceptional procedural right – or that they violate the right to be heard, a transmission of procedural documents seems inescapable.

Finally, there is a brief obiter dictum (three lines) at the end of recital 4.2.3. The Federal Court notes that the bank took the “precautionary measure of (privately) blocking the bank account”, which amounts to an abuse of rights. Without knowing all the facts, it is not possible to determine whether the blocking was the bank’s initiative or whether it was “blown up” by the heirs. The case, like the bank, has yet to reveal all its secrets.