CENTRE DE DROIT
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Bank liability and money laundering

Careful proof of prior offence

Par Grégoire Geissbühler le 14 May 2024

In its ruling HG210122-O, the Zurich Handelsgericht rejected a company's claim for damages against a former private bank, on the grounds that no prior offence had been proven and that the bank had fulfilled its obligations in terms of combating money laundering.

The company alleged that it had been defrauded by one of its suppliers in connection with a sale of fertilisers, as the products ordered never arrived. Part of the funds from this sale was transferred to a third-party company's account at the bank. The company claims that this was a money-laundering operation, for which the bank is liable because it failed to stop it.

The damage alleged by the company was purely economic (there was no consideration for its payment). The Handelsgericht therefore reiterated that, whatever the standard of imputation chosen (Art. 41 CO and 55 CC, Art. 55 CO, Art. 102 para. 1 or 2 PC), it is necessary to prove that a standard of asset protection has been breached in order to establish an unlawful act.

In this context, the topical standard is the suppression of money laundering (art. 305bis Swiss Criminal Code), and the company must therefore prove that at least one person within the bank individually fulfils all the objective and subjective elements of this offence. It will not succeed in doing so.

On the one hand, the company has not demonstrated the reality of the fraud that it alleges, and therefore of the predicate offence of money laundering : the mere refusal of delivery by its co-contractor is not enough, and it has not taken any civil steps to obtain enforcement, any more than a criminal conviction. A mere criminal complaint is not evidence, but merely an allegation, and other pending proceedings unrelated to the case are of no use to it. Nor has it been shown that his co-contractor falsified documents. Lastly, the use of offshore companies is not proof of an intention to deceive.

Secondly, the bank did not breach its money laundering obligations. In the absence of a proven prior offence, money laundering cannot be accepted, but there is more.

The company claims that one of its employees warned the bank of the criminal origin of the funds and asked it to freeze them. However, there is no proof of this call, and it would have been insufficient, in the absence of other evidence (the company and its employee being unknown to the bank), to lead to any action.

The bank’s internal control system also appears to be adequate. FINMA did initiate proceedings because of shortcomings in certain of the bank’s relationships at the time of the events, but no general deficiency in the system can be inferred from this, as the various relationships are not comparable.

Finally, with regard to the account through which the funds transited, this had been subject to special scrutiny by the bank when it was opened due to increased risks. However, the bank complied with its legal obligations and verified that the business relationship was plausible. It reported the disputed transactions to MROS and temporarily blocked the account (after the transfers). However, the transactions in question were based on the contract signed by the company, and although there are certain discrepancies regarding the amounts and the sale of fertilisers is not part of the account holder’s core business, these possible doubts are not sufficient to justify an act of money laundering by possible fraud or omission.

The Handelsgericht therefore rejected the application.

This ruling is in line with Federal Court ruling 4A_603/2020 of 16 November 2022 (see Fischer, cdbf.ch/1264/) and illustrates some of the difficulties that the victim of (alleged) embezzlement may encounter in an action against the bank.

In the absence of clear evidence of the prior offence, finding a case of money laundering was a tall order. The first lesson to be learned is that an action against a bank for money laundering presupposes that the prior offence has already been established to a considerable extent, and can only rarely be proposed to the victim as a first option. Civil proceedings, as currently conceived, leave little or no room for investigation, and the company would have been well advised to gather as much evidence as possible before taking action against the bank.

The Handelsgericht did not stop there, however, and went on to examine the conduct of the bank’s employees, thereby cementing the dismissal of the action. While the result appears appropriate in this case, the underlying reasoning deserves to be (re)discussed.

The case is one of civil liability, but much of the reasoning takes place on criminal grounds, which do not pursue the same goals and are not subject to the same conditions (on this issue, see also Giroud/Vallélian, La responsabilité civile des intermédiaires financiers pour blanchiment d’argent : du mythe à la réalité ?, in Werro/Pichonnaz (eds.) La responsabilité civile en arrêts et une nouveauté législative de taille, Berne 2022, pp. 196-198).

Art. 55 CO does not require fault on the part of the employee, but reserves the right for the employer to prove that he is discharged from liability, or even does not require strict proof of the employee’s act in complex organisations (Werro, La responsabilité civile, 3rd ed., Berne 2017, N 515). Requiring litigants to show that all the conditions for money laundering have been met for an employee amounts to a de facto derogation from the system established by the Code of Obligations, even though the activity presents increased risks.

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