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Sanctions

The clear-case procedure is closed to unblock a payment

Par Grégoire Geissbühler le 25 October 2024

In ruling 4A_394/2024 of 18 September 2024, the Federal Supreme Court confirms the inadmissibility of a clear-case application to debit the account of a client subject to sanctions, in order to pay his lawyer's fees.

A client held several bank accounts in Switzerland, in particular with a bank whose group was also active in Europe and the United Kingdom. The client is subject to sanctions in connection with the conflict in Ukraine, and his assets have been frozen by Switzerland, the United Kingdom and the European Union.

Between April and June 2023, the client requested and obtained authorisation from SECO to debit his account in order to pay the fees and expenses of his Swiss lawyer, who also had power of attorney over the account in question.

After the bank refused the debit in question, the customer brought a clear-case action against the bank at the end of June 2023, seeking payment of the costs and fees, and the future execution of other orders of this kind. The Court of First Instance held that the legal situation was unclear and declared the action inadmissible, a decision upheld by the Geneva Court of Justice, which led the customer to bring the matter before the Federal Supreme Court.

On the merits, the Federal Court recalls that the clear-case procedure is only open if the factual situation is not in dispute and the legal situation is clear (art. 257 CPC), failing which the application is inadmissible.

In this case, however, we are dealing with sanctions emanating from several legal orders, the respective scope and interaction of which are uncertain given the novelty of this situation. The authorisation given by SECO – which was, moreover, of limited duration and was apparently not renewed – could not therefore suffice on its own, without the foreign authorities having any say in the matter.

The bank had also reserved the right to refuse certain transactions for customers under sanctions. This twofold uncertainty about the case led the Federal Court to consider, as did the previous courts, that the legal situation was unclear and that the application should be declared inadmissible.

The Federal Court therefore dismissed the appeal.

Even if one wanted to reduce the case to a simple account-to-account transfer, resorting to the clear-case procedure in a doubly complex context (banking law and international sanctions) seems audacious at first sight. However, this procedure had two advantages, which were not immediately apparent.

On the one hand, political time is not the same as judicial time. The six and a half months granted by SECO (June-December 2023) seem a long time for a single payment, at a time when the general public increasingly has access to instant SEPA credit transfers. On the scale of ordinary legal proceedings, however, a case filed in June will not see a conciliation hearing before September, and with the interplay of postponements, extensions and cautio iudicatum solvi applications, it is unlikely that the main proceedings will open for another year. There was a risk that the SECO's precarious authorisation would expire before the end of the trial, at the risk of the client having to start the proceedings all over again.

The timetable seems to have proved the client right : the case was filed less than two weeks after SECO gave its approval (in June 2023), and the first instance decision was handed down on 21 December 2023.

On the other hand, this rapid procedure made it possible to sound out the bank's motives : was it a firm and definitive refusal, or a concern to avoid raising eyebrows with foreign regulators ?

SECO's authorisation was clearly not enough. But faced with a court decision, the bank could have pleaded with the other foreign authorities concerned that if it had complied, it was only after being forced to do so, under the threat of a daily fine and the unpleasant prospect of an order to pay, or even a bankruptcy order. If the bank wished to follow up the payment order in pectore, all it had to do was defend itself weakly against the clear-case motion and wait for the decision.

Unfortunately, the bank was determined and the case was sufficiently complex to be referred to the ordinary procedure.

The case is therefore not over : the customer can now take action through the usual channels, or try to obtain the authorisations of all the parties involved to unblock the situation and the funds amicably.

Beyond the procedural and banking issues, we must not forget that this case concerns the payment of legal fees. While sanctions are useful, they should not infringe the rights of the defence, and we hope that this remains clear in everyone's minds.
