CENTRE DE DROIT
BANCAIRE ET FINANCIER

Fraudulent banking orders

The judge must examine all the circumstances

Par Romain Dupuis le 18 December 2024

The Swiss Federal Supreme Court recently handed down a new ruling on the subject of fraudulent bank orders, in which it annulled a cantonal decision on the grounds that it did not address all the issues raised by the plaintiff (ruling 4A_135/2023 of October 16, 2024).

Although this ruling mainly concerns questions of civil procedure, it nevertheless serves as a useful reminder of the scope of the examination that the court must undertake in the presence of fraudulent orders.

In 2007, a customer opened an account with a Swiss bank and granted power of attorney to his father and brother. The contractual relationship was " *execution only* ". The customer deposits over 17 million euros in the account, the vast majority of which is invested in four insurance policies. Shortly after opening the banking relationship, the customer also grants a third party a right to information and*e-banking* access concerning his account.

Between the end of 2007 and 2008, the account was debited several times, totalling over 10 million euros. It later emerged that these debits were based on falsified documents, in particular a Lombard loan contract with pledged insurance policies and several transfer orders bearing the customer's (forged) signature.

Upon discovery of the fraud, the customer turned against the bank and claimed restitution of the misappropriated funds before the Ticino courts.

After limiting the proceedings to the examination of certain questions determined in application of art. 125 let. a CPC, the Ticino judge handed down an incidental decision in which he found, among other things, that the bank had failed to verify the authenticity of the orders submitted to it in accordance with the terms agreed between the parties in the general terms and conditions, and had therefore been guilty of gross negligence. The judge also found that the customer had no knowledge of the falsified orders and did not ratify them.

The bank appealed to the cantonal court, which set aside the first-instance judgment and dismissed the customer's claim in its entirety. The customer therefore lodged an appeal with the Swiss Federal Supreme Court.

In substance, the customer complained of a violation of his right to be heard, insofar as the Cantonal Court of Appeal had given a final ruling on the merits of the case, dismissing all his

claims, whereas the first judge had given an incidental ruling limited to certain specific issues. In this context, the customer criticized the Cantonal Court for not ruling on other issues in dispute, in particular the validity of the Lombard loan contract with pledged insurance policies, which also bore a forged signature. The client argued that the cantonal court could not dispense with this examination in its analysis of the bank's fault in executing the transfer orders.

After a few theoretical reminders of the appellate court's power of review and the obligation to give reasons for its decisions, the Federal Court found that, in its recitals, the Cantonal Court had in fact only examined the question of the bank's diligence in relation to the fraudulent orders, without ruling on the relevance of the falsified lombard loan agreement in the context of this analysis. As noted by the Federal Court, this issue had been raised by the customer in the appeal proceedings.

Following the customer's argumentation, the Federal Court considers that the circumstances surrounding the conclusion of the falsified credit agreement may be relevant to the examination of fraudulent bank orders (according to the three-step method developed inATF 146 III 121 and then repeated in numerous subsequent rulings), insofar as the execution of certain disputed transactions and the negative balance with which the account ended up are linked to the credit line disputed by the customer.

For this reason, the Federal Court considers that the cantonal court violated the customer's right to be heard, and that the case should be referred back to it for a new decision and, if necessary, a subsequent referral back to the first judge if the state of affairs requires further clarification.

Two concluding remarks :

1. From a procedural point of view, it is reassuring to note that the Federal Court expects the cantonal courts to rule on the grievances regularly raised at first instance and on appeal. While, according to case law, the parties' right to be heard "does not require the judge to discuss every argument", it is clear that questions important to the outcome of the dispute cannot simply be ignored.
2. It should be noted, however, that the Federal Court is not ruling on the merits of the case. It is entirely possible – and in our view not illogical – that the solution arrived at by the Cantonal Court in its next decision will be identical to that which gave rise to the judgment that is the subject of this commentary. However, before rendering its new decision, the Cantonal Court will have to examine – as required by the case law on fraudulent orders (cf. e.g. ATF 146 III 326, recital 6.3.2) – all the circumstances, in particular the conclusion of the credit line, in order to be able to rule again on the bank's possible fault.
