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Fraudulent bank orders

Can the foundation’s mistake really interrupt everything ?

Par Célian Hirsch le 19 February 2025

A customer who receives notice of a fraudulent direct debit commits a fault if they do not dispute it. This fault interrupts the causal link between the bank’s serious fault and the damage (4A_610/2023).

A Liechtenstein foundation manages the assets of a prince. Its headquarters are at a law firm in Liechtenstein. A lawyer from this firm is a member of the foundation board with joint signature with the prince.

The foundation opened an account with a bank in Geneva. They agreed that the bank statements would be sent to the office with a copy to the prince. The contractual documentation stipulated that the client bore the risks in the event of fraudulent orders. It imposed a requirement to lodge a written complaint against the statements within 30 days ; failing this, the statements were deemed to have been approved and the losses borne by the client.

In February 2017, a fraudster managed to take possession of the electronic box of the prince’s accountant. On April 5, 2017, he managed to deceive the lawyer and instructed the bank to transfer USD 650,000 to a company in Hong Kong with the reason being a “purchase of machinery”. On April 27, 2017, the fraudster repeated the scam and succeeded, using the same reason, in having the balance of the account, i.e. approximately USD 100,000, paid to a bank in China. The bank sent the debit notices for these two transfers to the foundation’s head office by post.

On August 9, 2017, the prince went to the bank’s premises. There he discovered the fraud and reportedly contested the fraudulent orders.

On August 28, 2018, the foundation contested the fraudulent orders in writing. It filed a claim for payment of approximately USD 750,000 against the bank with the Court of First Instance in Geneva.

The court accepted the claim in full. It considered that the bank had committed a serious error. The orders were unusual and the bank did not carry out a *call-back*. It could not therefore invoke the risk transfer clause. Furthermore, given that the lawyer had been deceived by the fraudster, the sending of debit notices to the law firm did not allow him to invoke the complaint clause. Only actual knowledge by the prince and the lawyer could have allowed the application of the complaint clause. The prince’s reaction during his visit to the bank was thus made in

time.

The Court of Justice upholds the bank's appeal (ACJC/1515/2023). The sending of debit notices to the foundation, i.e. the office, was decisive. Indeed, the bank's co-contracting party is the foundation, not the prince. It was then incumbent upon the foundation to forward the notices to the persons able to process them according to its own organization. Furthermore, the prince did not make any written complaint during his visit to the bank. Therefore, the complaint of August 28, 2018, more than a year after the transfers, was late. The disputed transfers are thus deemed to have been ratified by the foundation. Finally, the bank did not commit any abuse of rights, in particular because the debit notices were communicated to the foundation.

The Federal Court begins with a reminder of its three-step method. First, it examines whether the orders were given with or without a "mandate". In the present case, it is no longer disputed that the orders were given without a mandate. Secondly, the court examines whether the parties have deviated from the legal system, namely that the bank bears the loss, by means of a risk transfer clause.

According to the Federal Court, when the parties have concluded a risk transfer clause, the potential concomitant fault of the client is examined in the second stage. This fault may interrupt the adequate causal link between the bank's serious fault and the damage. Such an interruption must be accepted when the client does not consult his file in the bank remaining and/or does not contest the communications sent by the bank, in violation of the general conditions and the rules of good faith.

In this case, the Federal Court confirmed the Court's assessment that it was up to the foundation to be better organized. Thus, the notification of debit notices to the lawyer, an organ of the foundation, and therefore his knowledge of them, are attributable to the foundation.

Given that the deadline for contestation had not been met, the Federal Court deemed that the client was at fault, which automatically interrupted the causal link between the bank's serious misconduct and the damage suffered. Furthermore, like the Court, the Federal Court considered that the bank had not committed any abuse of rights. It therefore dismissed the appeal.

The result of this judgment seems convincing. The foundation was notified of the fraudulent orders. In the absence of timely objection, the fiction of ratification applies and the bank would not commit any abuse of rights in invoking it (despite its serious fault).

That being said, the reasoning of the Federal Tribunal in reaching this conclusion, unlike that of the Court of Justice, is open to criticism. The Court had nevertheless carried out a rigorous examination, supported by doctrine, without mixing up the various issues.

Firstly, in the case of an order executed "without a mandate", the client has a right to restitution of his assets (and not a right to damages). The client's fault cannot be invoked to oppose this action (ATF 146 III 121 c. 3.1.2 ; Liégeois/Hirsch, Ordres bancaires frauduleux : discours de la méthode, SJ 2021, p. 145). This fault must be examined in the third stage, namely when the bank invokes a claim for damages against the customer.

Secondly, for a fault on the part of the customer to break the causal link, not only must it be serious, but it must also be effectively causally linked to the damage. However, in the case in

question, the client had argued before both the Court (contrary to what the Federal Court stated) and the Federal Court that an immediate reaction would not have changed anything, as the orders had already been executed. The Federal Court could not ignore this argument and automatically assume an interruption of the causal link.

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