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Beware in whom you trust! – New leading decision on the abuse of power in banking

In a new leading decision, the Swiss Federal Supreme Court upheld the action brought by a bank customer in connection with the abuse of a power of attorney and ordered the bank to pay the amounts unduly transferred from the customer's account to third parties. The decision is significant for two reasons: First, it clarifies open questions in connection with the requirements regarding the banks' duty of care in the event of abuse of a power of attorney. Second, it confirms the recent trend in case law that bank customers have an obligation to check their bank documents.

Background

The decision of the Swiss Federal Supreme Court (BGer 4A_504/2018, to be published as a leading decision) was essentially based on the following facts: A bank customer had granted a general and unlimited power of attorney (general power) to an acquaintance (the agent) for her two bank accounts. This general power also allowed the agent to take actions for his own benefit. Correspondence regarding the first bank account was delivered only to the agent. As far as the second bank account was concerned, correspondence was held by the bank based on a hold-mail agreement.

Subsequently, the agent embezzled around 13 million Swiss francs from the bank customer over a period of two and a half years by arranging numerous transfers in his favour to accounts at the same bank in order to finance the purchase of a property and the mortgage granted to him by the bank. When the customer discovered the embezzlement, she filed criminal charges. The agent admitted that he had abused the customer's trust and embezzled the funds. As a result, the customer

filed a complaint against the bank for payment of the embezzled amounts. While the two cantonal courts rejected the customer's claim, the Swiss Federal Supreme Court approved it.

Requirements regarding the bank's duty of care

The Swiss Federal Supreme Court initially dealt with the question of whether the bank was entitled to assume the legitimacy of the transactions on the basis of the general power granted by the customer to the agent. As a rule, the principal who notifies the power of attorney granted to an agent to a third party in writing is bound by the legal act performed by the agent if the act falls within the scope of the written power so notified. The situation is different if the agent abuses their power and the third party becomes or ought to have become aware of that abuse by applying the attention required under the circumstances. To determine the level of attention required under the circumstances, the court must take into account all of the circumstances of the specific case and use objective criteria.

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In banking transactions, powers from customers to third parties are generally granted on standard power of attorney forms provided by the respective bank. Nevertheless, the general principles set out above also apply to the banking business. Thus, the Swiss Federal Supreme Court did not adopt the bank's argument that it should have intervened only if the bank had been certain that the transactions were to the detriment of the bank customer. The decision also states that the bank cannot reduce the requirements regarding its duty of care by phrasing the power accordingly. In contrast to the lower courts, the Swiss Federal Supreme Court did not consider the need for rapid processing of payment transactions as a reason to restrict the duty of care required in banking transactions.

Troublesome conflict of interest

In this particular case, the main factor relevant for assessing the bank's compliance with the required duty of care was the bank's conflict of interest. The agent had used the considerable sums resulting from the unauthorised transactions to finance his mortgage granted to him by the same bank. According to the Swiss Federal Supreme Court, the bank should have been particularly vigilant in such a situation. Other relevant aspects were proven doubts expressed by two account managers at the bank about the legitimacy of the transactions and the fact that with the numerous transfers, the agent had completely drained the customer's account at the bank. The Swiss Federal Supreme Court therefore ruled that the bank had not acted with the attention required under the circumstances.

The customer's claim for performance

If a transfer is made without the customer's order, the transfer does not constitute fulfilment of the contract in relation to the customer. The customer may therefore still demand payment of the corresponding amount. In banking practice, this risk of double payment is regularly transferred to the customer by way of the general terms and conditions. According to the Swiss Federal Supreme Court, such risk transfer clauses are generally permissible.

Since, however, in the present case the transfers had been made without the customer's instructions and no risk transfer clause had been agreed between the parties, the bank had to stand the loss arising from the unauthorised transactions. Therefore, the customer could rightfully claim payment of the corresponding amounts from the bank.



The customer's duty of care

If, in the case of unauthorised transactions, the bank assumes the loss, it may counter the customer's claim for performance with a claim for damages provided the customer has contributed to the occurrence of the loss or to its increase by a breach of duty.

Usually, the general terms and conditions of the banks provide for an obligation of the customer to check their account statements and to object to unusual or unjustified transactions within a short period of time. In recent case law, the Swiss Federal Supreme Court by referring to this obligation, which is customary in the industry, has acknowledged a duty of care of the customer to check notifications from the bank promptly in order to prevent or at least reduce the damage caused by false entries and unauthorised transactions. In the decision discussed here, the Swiss Federal Supreme Court has for the first time confirmed the existence of the bank customer's duty of care to check his banking documents in a published leading decision. In the specific case, however, this duty was not relevant due to procedural reasons.

In another decision published practically at the same time (BGer 4A_337/2019), the Swiss Federal Supreme Court had the opportunity to discuss in more detail the bank customer's duty of care. It specified that the bank must prove the following in order to assert its claim for damages arising from a breach of this duty of care by the customer: First, the bank documents showing the unauthorised transactions must actually have been delivered to the customer or stored by the bank in case of hold-mail arrangements. Second, the documents must be designed in such a way that the customer would have been able to identify the unauthorised transactions if they had inspected the documents. Depending on the context, the false entries must immediately catch the eye. This issue is likely to continue to be a topic in the practice of the courts, as a number of relevant questions remain open.