FRAUDULENT TRANSFER: THE PAYMENT SERVICES LAW PROTECTS THE BANKER OF THE PAYEE

(Court of Appeal, 4th ch., 7 March 2023, judgment no. 39/23 IV)

The decision of the Court of Appeal of 7 March 2023 (now *res judicata*) is worth highlighting in relation to the issue of the liability of the banker, or more generally the payment service provider (the "**PSP"**), when it executes a transfer that turns out to be fraudulent.

Traditionally, the question was considered by Luxembourg courts in the light of the theory of the substitute agent contained in Article 1994, paragraph 2, of the Civil Code.

According to this theory, the banker of the beneficiary of the credit transfer acted not only as the payee's agent for the receipt and collection of the payment, but also as the payer's substitute agent insofar as the payer entrusted him with the task of crediting the transferred sum to the payee. As a result, the banker of the payee was liable to the payer in the event of wrongful non-performance of his obligations, and in particular in the event of a breach of his obligations of due care and diligence when he had executed a fraudulent transfer.

The judgment of the Court of Appeal of 7 March 2023 abandons this traditional approach. Following MOLITOR's argumentation, the Court of Appeal held that the provisions of the amended law of 10 November 2009 on payment services (the "**2009 Law**") should, on the contrary, protect the PSP of the payee.

The facts in question, which have unfortunately tended to become commonplace over the last few years, concerned a French company (the "**Company**") that was the victim of what the fraudulent transfer typology calls the "*president fraud*"[1]. The Company's accountant had initiated a transfer order requested in an e-mail allegedly sent by her employer for payment of a false bill for substantial legal fees. The Company's French bank (the payer's PSP) executed the transfer to an account held by a Luxembourg PSP (the payee's PSP). Nearly all the funds received in the payee's Luxembourg account were transferred almost immediately, in the early hours of the next morning, to another account abroad, without the Company and its bank having been able to notify the payee's PSP in good time.

The Company sought to hold the PSP of the payee of the transfer liable for not blocking the funds received in the Luxembourg account, even though it would have been aware or could not have been unaware of the fraudulent nature of the transfer.

The Company based its claim on the theory of the substitute agent and argued that, despite the absence of a contractual relationship between it and the PSP of the payee, the latter had acted as a substitute agent for its bank (PSP of the payer) for the purposes of executing the transfer. The payee's PSP was thus under a duty of care and diligence in executing the mandate and should, in the Company's view, not have executed, or at least have postponed, the transfer in the presence of an apparent anomaly or a transfer that it knew to be fraudulent, on pain of incurring liability on the basis of the direct action available to the payer pursuant to Article 1994, paragraph 2 of the Civil Code.

In response to these arguments, the Court of Appeal accepted the defences presented by MOLITOR acting in support of the payee's PSP interests, and held that the liability regime introduced by the 2009 Law should apply exclusively to rights and obligations linked to the service and to the use of services payment.

The dispute was clearly within the scope of the 2009 Law, since both the payer's PSP and the payee's PSP were located in a Member State of the European Economic Area (EEA) and the transfer was denominated in Euro.

As a result of the exclusive application of the 2009 Law, the Court of Appeal ruled that the theory of the substitute agent should be set aside.

The 2009 Law requires that from the moment the transfer order is received by the payer's PSP, it can no longer be revoked and must be executed by the payee's PSP as soon as all the conditions of the contract linked to the payer's account are met.

Moreover, the distributive liability regime introduced by Article 101(1) of the 2009 Law implies that the PSP of the payer and the PSP of the payee can only be liable towards their respective customers, and that the PSP of the payee is only liable to the payee for the proper execution of the payment transaction if it has received the amount of the payment transaction and has not made the amount available to the payee.

In the case before the Court of Appeal, Article 101(1) of the 2009 Law did not give rise to any liability on the part of the payer against the PSP of the payee. The transfer had indeed been validly executed in accordance with the provisions of that law, and the funds had been credited to the account indicated by the Company in its transfer order and opened in the name of the payee. The Court of Appeal therefore decided to reject the payer's claims against the payee's PSP as unfounded, refusing to recognise the latter's liability.

Our team is at your disposal to provide you with any further information on this subject.

Version française ici.

[1] Financial Intelligence Unit, *Note - Counterfeit transfers. Analysis of typologies* (version of 24 April 2019).