Claim for damages against the beneficiary bank of fraudulently triggered payments

Topic: **Abuse and fraud** Case number: **2020/13**

> The client represented by a lawyer was the victim of a phishing attack. Unknown fraudsters succeeded in eliciting his e-banking access data by means of a phishing website that looked deceptively similar to his bank's website. Within a short time, they triggered several payments totaling around CHF 250'000. These payments were made to the account of a client of a third-party bank (a so-called "money mule"), used by the fraudsters to forward the money abroad". The recipient "money mule" withdrew around CHF 20'000 in cash within a few days and then sent the money by post to an address in Moscow. The defrauded client agreed with the first bank on a compensation payment of CHF 120'000. He tried to claim the rest of his loss of CHF 80'000 from the recipient bank, which he accused of having violated money laundering regulations. The bank refused to pay compensation, and the client brought the case to the Ombudsman. In the Ombudsman proceedings, no solution could be reached for the part of the loss not covered by the first bank.

The client of the recipient bank had received a job offer from unknown third parties via SMS, which he accepted and shortly afterwards received an employment contract written in bad German as a "task manager". He then received instructions via SMS and e-mail to make his bank account available for funds, which he was then to withdraw immediately in tranches in cash and forward by post to an address in Moscow. The money came from the victimised client, whose account the fraudsters had been able to access with the obtained access data. He fulfilled the tasks given to him and received a fee for it. However, the last tranche of about CHF 50'000 was seized by the public prosecutor's office, which acted on a criminal complaint filed by the damaged party. The client of the recipient bank (the "money mule") was finally convicted of money laundering for his actions by means of a criminal order. The claims of the aggrieved client were referred to the civil proceedings. The convicted person was most likely penniless. The actual fraudsters remained unknown.

Through the criminal proceedings, the aggrieved client became aware of the fact that, before the payments originating from his account were credited, there was only a balance of around CHF 200 in the recipient bank's client's account and that only a modest pension had been regularly received on it over many years. He was therefore of the opinion that both the payment receipts and the cash withdrawals, which occurred suddenly over a very short period of time, should have attracted the attention of the recipient bank as unusual within the framework of the mandatory money laundering prevention measures and should have been stopped. For this reason, he demanded that the portion of his loss which had not already been covered by his bank, should be assumed by the recipient bank.

The beneficiary bank claimed that it was self-evident that it had not been able to react to the first credit entry or cash withdrawal in this case. The transactions had been discovered within a short period of time by its money laundering prevention system. The client advisor then had contacted the recipient of the money by telephone. The recipient had explained the transactions plausibly. He had claimed that he had sold shares in a German limited liability company to the damaged party and had then forwarded the money in cash by post to this limited liability company in order to save the costs for the otherwise necessary bank transfers. The client advisor had obtained documentation from the

client for these explanations and had come to the conclusion that they were plausible.

One day later, the freezing order of the public prosecutor's office reached the beneficiary bank, which was able to seize a remaining amount of CHF 50'000. The beneficiary bank was of the opinion that it had reacted to the incidents in a timely and appropriate manner. For the sake of completeness, it informed the damaged party that the provisions of the Anti-Money Laundering Act and the associated ordinances would not constitute protective norms for a non-contractual liability under Art. 41 of the Swiss Code of Obligations.

Even after the Ombudsman's intervention, the recipient bank was not prepared to make any concessions to the aggrieved party and merely repeated the position it had already taken directly to the client's lawyer. The Ombudsman therefore had to close the file with a final notice without result.

In the final notice, he commented on the possible basis for a liability in such a case. Since the damaged party had no contractual relationship with the recipient bank, only a non-contractual liability under Art. 41 of the Swiss Code of Obligations came into question. In the case of pure pecuniary loss, this requires, among other things, the violation of a so-called protective norm, which has the purpose of preventing such pecuniary loss. Contrary to the view of the recipient bank, it is the Ombudsman's understanding that Art. 305bis of the money laundering provisions of the Swiss Penal Code can constitute such a protective norm. However, this is only the case if the rule is violated intentionally or possibly intentionally, i.e. if its violation occurs deliberately or more than merely negligent. A negligent breach of the rule is not sufficient for constituting a civil liability

The relevant question in this case was thus whether allowing the cash payments by the bank and its employees qualified as an act of thwarting within the meaning of the money laundering standard of Art. 305bis of the Swiss Penal Code and, if so, whether these acts had been committed intentionally or at least possibly intentionally.

It was understandable to the Ombudsman, in view of the transfers and cash withdrawals under discussion, that the aggrieved client was of the opinion that the bank had breached its duties to clarify these unusual transactions, had thereby made it impossible to recover the funds and was liable for the loss he had suffered. Looking at the list of transactions, in particular the cash withdrawals, the question did indeed arise as to whether the bank had reacted in time. However, whether the bank's actions were still within the usual and permissible range, or whether there had already been a breach of supervisory duties or criminally relevant conduct, was a question that could not be clarified with the means of the Ombudsman procedure. This also applied to the particularly sensitive question of whether there was intent or contingent intent.