Recovery of payments in an alleged fraud case

Topic: **Abuse and fraud** Case number: **2020/07**

> The client was contacted by telephone by persons who offered him lucrative investment deals. He then made payments of over 100’000 Swiss francs in accordance with the instructions of these persons, which he made partly by e-banking with his bank and partly by charging the credit card issued by the same bank. After these persons had shown him considerable profits in the meantime, he lost contact with them after a few months and realised that he had become a victim of fraudsters. He accused the bank of having breached its duty of care by not warning him about the fraudsters and therefore demanded the amount of the payments back from the bank. The bank refused the customer’s demands for repayment, whereupon he submitted the case to the Ombudsman. The Ombudsman was unable to help him.

The arguments in the customer’s complaint were known to the Ombudsman from a large number of parallel cases. The customers concerned apparently use service providers not known to the Ombudsman, who draft the complaints to the bank as well as the submissions to the Ombudsman. The wording of these complaints is largely comparable. Initially, the complaints were written in English, even in the case of clients who normally correspond in German, and later in faulty German, which probably originated from a translation programme. The same formulations are used again and again. The complaints are hardly adapted to the specific cases of the clients and do not deal with the applicable law. They regularly contain serious accusations against the bank and a wild potpourri of legal arguments, which are often taken from misinterpreted foreign law and can only be very indirectly connected to the clients’ cases. It is to be feared that the clients pay for this service and lose further money in addition to the loss suffered through the fraud.

Unfortunately, it often remains unclear in these cases what actually happened in detail. The same customers often file virtually identical complaints against several banks. The Ombudsman must therefore limit himself to informing the customers concerned about the basic legal situation in connection with bank transfers and credit card payments.

In the case of bank transfers, a bank is obliged under the principles of contract law to execute a customer’s orders promptly and correctly. It must ensure that the order was placed by a person authorised to do so or that it shows the agreed identification features. If the agreed requirements are met, a bank is obliged to execute an order in a timely manner. In the Ombudsman’s understanding, there is no entitlement for the customer to have the bank check the payees designated by him or the circumstances of a payment against certain criteria and to warn him. In his understanding, the systematic monitoring of reports from official and unofficial bodies on financial providers and reconciliation of customer orders with such information is also not part of a bank’s duties. The Ombudsman is not aware of any corresponding legal provisions, regulatory requirements or court decisions that would impose such a responsibility on the bank. Rather, the careful examination of business partners is the responsibility of the customer who decides to initiate a payment to them.

It was therefore not apparent to the Ombudsman what arguments he could use to persuade the bank to compensate the client in connection with the transfers under discussion. There was no evidence that the bank had not executed his payment orders in accordance with its contractual obligations as

he had given and authorised them. The bank was clearly unable to carry out a chargeback, as the money was transferred to a customer account at another bank based abroad. In such a case, a customer can ask his bank to arrange a reverse transfer. In order for this to take place, the money must still be available in the recipient's account and the recipient must give its consent to a chargeback. If there is a clear allegation of fraud, the bank can also try to request the recipient bank to block the money until an official order arrives. In the specific case, it was not known whether the client had instructed his bank to reclaim the money. However, since he had only contacted the bank several months after the transfer, it could hardly be assumed that the money could have been recovered in this way. Experience shows that the unknown fraudsters regularly dispose of the amounts immediately after they have been credited to the recipient's account.

In the client's case, it was also important that the transfers were apparently not made to accounts of the fraudulent companies he had named, but to accounts of third parties. It was unclear what relationship these third parties had to the companies whose alleged representatives had induced the client to make the payments, and whether these third parties had themselves become victims of a criminal offence or at least had been abused. The client had filed a criminal complaint. It is possible that the investigation by the prosecution authorities will provide clarification in this regard at a later date.

The customer made two of the disputed payments with his credit card. The bank represented the view to him that it was always the cardholder's responsibility to carefully check a payee before triggering a payment. According to the rules of the relevant credit card network, in the case of an investment company as the payment recipient, the service is considered fully provided as soon as the amounts were credited to the investment account. There was no possibility of a subsequent reclaim if the investment services subsequently did not correspond to those promised to the cardholder.

As the Ombudsman understands it, the obligations of a credit card issuer are usually set out in a contract, i.e. the card terms and conditions. These usually provide that a payment is to be made when it has been authorised by the customer (or initiated using the agreed means of legitimation). According to the Ombudsman's experience, such card conditions do not provide for an obligation on the part of credit card issuers to check the recipients of credit card payments and, if necessary, to warn their customers about certain recipients. He is also not aware of any relevant court rulings or doctrines affirming such a duty. It is therefore probably indeed up to the cardholder to carefully check his contracting party before making a payment. The bank or the card issuer and the credit card organisation is only responsible for processing the payment. However, it is not involved in the underlying transaction, i.e. the contract between the cardholder and the merchant who accepts the card payment.

The policies of the credit card organisations nevertheless provide that a chargeback can be requested in certain situations. According to the so-called chargeback guides, a chargeback can take place, for example, if a merchant has not provided a contractually guaranteed service (chargeback reason "service not provided"). In such cases, according to the Ombudsman's knowledge, longer complaint periods than the usually applicable 30 days apply. In cases such as the customer's, which involve payments to financial companies that the customer claims are acting fraudulently, the question does indeed arise as to whether such a chargeback reason should not be assumed. The client also implicitly invoked this in his complaint to the Ombudsman.

The Ombudsman therefore contacted the bank and asked it why no chargeback procedure had been carried out in this case. The bank explained that the customer had explicitly authorised the transaction within the framework of a so-called 2-factor authentication via an app on his mobile phone. In such a case, a chargeback procedure was not available. It reiterated its view that, according to the card networks, the service of an investment firm is deemed to have been provided when the

money charged to the client’s credit card has been credited to his client account with the investment firm. The longer time limits for complaining on the grounds of “service not provided” only applied if the merchant did not provide the service immediately. The customer had not objected to the transaction in time. The bank was therefore not prepared to make any concessions on the credit card transactions either.

The Ombudsman found it difficult to accept the attitude of certain credit card issuers. If a customer claims that an investment company has not used his money as contractually agreed, he believes that the charge-back reason “service not provided” is eminent. In his opinion, the credit card issuers should offer to initiate such proceedings. In these proceedings, the payee would then have the opportunity to show that he had provided the promised service. Ultimately, however, this is a matter of interpreting an internal set of rules of the credit card networks, from which a customer cannot derive any direct rights anyway. The Ombudsman is of the opinion, however, that credit card issuers must make use of this instrument when it is available, due to their duty of care and loyalty towards the customer.

According to the Ombudsman’s experience, however, chargeback procedures in such cases are not successful anyway, since the payment recipients are probably often not fraudsters but basically recognised companies which were themselves abused by the fraudsters for the offences by the perpetrators having gained access to the customers’ accounts there.

The Ombudsman found no evidence of misconduct by the bank in relation to the transfers. In the case of the disputed credit card charges, the Ombudsman would have welcomed a charge-back procedure. However, it was highly doubtful whether this would have resulted in a positive outcome for the customer. In view of the bank’s clear stance and unwillingness to make concessions, the Ombudsman had to close the case with a decision containing the above explanations. It was also not possible for the Ombudsman to achieve a positive outcome for the clients in other comparable cases for the same reasons.