

Banking - Austria

Supreme Court rules on revocation of credit based on forged cheques

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Facts

The claimant deposited two cheques with an Austrian bank for encashment from French banks, on which the cheques were drawn. The Austrian bank sent the cheques to the French banks, received the relevant amounts and credited the money to the claimant's current account. Roughly one month later, the French banks informed the Austrian bank that the cheques had been forged and asked for a refund. The Austrian bank cancelled the credit and sent the funds back to the French banks. The account holder, who did not have prior knowledge of the forgery, sued the Austrian bank to reverse the cancellation of the credit.

Lower courts' decisions

At first and second instance the courts ruled that the credit on the claimant's current account constituted an abstract obligation as a consequence of the French banks' instruction to the Austrian collecting bank to pay out the cheques - an instruction which was accepted and executed by the Austrian bank. Although triggered by the forged cheques, the instruction was considered a separate obligation which, through the acceptance of the collecting bank, became abstract. This is an example of a rare case where Austrian law recognises abstract obligations. Such an abstract obligation also had the effect of excluding the collecting bank from objections stemming from the relationship between the issuer of the cheques, its holder and the French banks. The credit becomes irrevocable when the account holder can dispose of the credited amount.

Supreme Court decision

The Supreme Court reversed the decisions of the lower courts and stated that a cheque constitutes an unconditional instruction to the bank on which it is drawn to pay a specified amount of money to the beneficiary of the cheque. Crediting a presented cheque requires a valid instruction. A forged signature on a cheque, however, does not constitute a valid payment instruction to the bank. The credit on the account of the presenting party in this situation does not generate an abstract obligation of the collecting bank.

The Supreme Court had already ruled in several decisions that a bank has a claim for unjust enrichment if: (i) a credit is made based on a missing transfer instruction; or (ii) an erroneous credit or transfer is made. A forged or invalid payment instruction is tantamount to a missing transfer instruction. In such cases the liquidation of unjust enrichment must take place between the bank which made the erroneous payment and its recipient. In the present case, two such payments without legal cause occurred: the payment from the French banks to the Austrian collecting bank, and the payment of the latter to the claimant.

Even a recipient in good faith, which trusted in the validity of the transaction, must repay the cashed amount; the remitter is thereby protected by the law and may claim a refund. This principle may be overruled only if the remitter has given the impression of a valid transfer order in an imputable manner.

The Supreme Court put forward two additional arguments as to why the cancellation of

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the credit was lawful. First, the collecting bank was mandated by its client to collect the cheques. It is a well-established principle of the law on mandates that the mandatory party shall not make a profit from carrying out the mandate, but shall also not suffer a loss on it. As the collecting bank had to repay the funds to the French banks, it had the right to reclaim those funds from its client.

Second, the General Business Conditions contain a provision that credit may be withdrawn if the bank has collected the amount outside of Austria and is under obligation to repay it, which persisted in this case.

Comment

It is surprising that it took three instances to establish that forged cheques should not be honoured. However, the legal issues are quite complex. Cancellation of the credit was possible only because the Austrian collecting bank was obliged to repay the funds to the French banks. The basis for such a claim was the unjust enrichment that the court established on the part of the collecting bank, as it received the payment by presenting forged cheques and thus without valid legal grounds.

Although the case involved a cross-border transaction, the court did not waste deliberations on the law applicable to the issue of unjust enrichment. Normally, it is the law of the country where the unjust enrichment occurs (in this case, Austria); but if there is a (valid or invalid) contractual relationship, it is the law of the country governing it (in this case France as domicile of the banks on which the cheques were drawn), the relationship being the 'account' or 'correspondent banking' agreement between the banks. But the tacit assumption of the court that both countries would treat unjust enrichment similarly is not unreasonable.

The other reason why the Austrian bank was unjustly enriched and under obligation to refund the moneys to the French banks was that it was acting in its own name. As is usually the case with the collection of cheques, the Austrian collecting bank did not disclose the identity of its client to the French banks on whose account it was acting. Consequently, the French banks rightly considered the Austrian bank as their contracting party.

Once the obligation of the Austrian bank to repay the received funds was established due to the faulty instruction on the forged cheques, it followed that the client of the Austrian bank also was not entitled to retain the proceeds.

Would the result have been different if the Austrian bank had acted only as an agent for its disclosed client? No, but the reasoning would have been different. Although in this case the Austrian bank's client would be obliged to make the repayment, the Austrian bank's payment to the French banks would be qualified as a payment on behalf of the client which he could not prevent. The Austrian bank would thereby acquired a claim (*versio in rem*) against the client which could be debited to the client's account; this would have the same effect as the cancellation of the credit.

All these scenarios work only as long as the proceeds of the forged cheques sat in the account. Otherwise, the question of in whose name the cheques were deposited for collection became of utmost importance for allocating the risk of collecting the funds from the (runaway) client. If it is the collecting bank, it could possibly have a claim for damages if the payer bank did not observe the appropriate diligence when first checking the signatures on the cheques.

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