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SWISS BANK ACCOUNTS – WHO HAS TO BEAR THE DAMAGE RESULTING FROM FRAUDULENT TRANSACTIONS OF HACKERS?

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Who is liable for the damage if a hacker succeeds in initiating fraudulent transactions on a Swiss bank account?

According to a judgement of the Swiss Federal Court, it was the bank which ultimately had to bear the loss (SWISS FEDERAL COURT, decision of 5 December 2016, 4A_386/2016). However, do not be too sure that this will always be the case. In comparable cases, it could also be that the bank customer is left bearing the damage caused by an unauthorised person.

In order to familiarise you with the legal situation regarding Swiss bank accounts, we would like to present the facts and findings of the Federal Court's decision in detail. This also helps you - as a client of a Swiss bank - to understand why it is always advisable to read the Bank's General Terms and Conditions carefully and to comply with them.

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I. Facts

A.a. C. is a US citizen employed as a paralegal in a large US law firm. His annual income is approximately USD 90,000. In the 1980s, he established a banking relationship with the Lausanne branch of a banking institution which was taken over in 2008 by Bank B. (hereinafter: the bank). Within the framework of this relationship, C. (hereinafter: the client) signed the following documents:

- The **Bank's General Terms and Conditions**, version of March 2004. According to these, the **client** must be **liable** for the following damage: **"any damage resulting from the use of mail, telegraph, telephone, telex, or any other system of communication or means of transport, [...] except in case of gross negligence by the Bank"** (art. 6). In addition, **statements of account issued by the bank shall be deemed accepted if they do not give rise to any objections within one month of receipt** (art. 9 § 3). **Objections** against the bank's communications **must be made promptly** upon receipt, but **at the latest within the prescribed period** (art. 2). Finally, Swiss law is applicable to relations between the bank and the client and a choice of court is established in favour of the courts of the place of the establishment of the bank concerned (art. 17);
- A **discharge for transmissions by telephone, telefax, telegram or e-mail**, which **empowers the bank** but does not require it to **execute the instructions received by one of these means of communication**. **The resulting risks are borne by the client**, **unless in the case of gross negligence of the bank** (art. 3);
- A **remaining bank agreement** whereby the **client confirms** that he wishes the **letters from the bank to be retained by the latter**, acknowledges that this **retention is equivalent to communication** and declares that he has taken cognizance of the provisions of the General Conditions relating to the challenge of communications originating from the bank.

The client subsequently received the **Bank's General Terms and Conditions** in their 2010 form. They provide that the bank's correspondence kept in the bank shall be deemed to have been disclosed on the date that they bear (art. 3), and any objections must be made in writing immediately after receipt of the corresponding notice, but at the latest within one month of its communication (art. 2 and 10); **damages resulting from fraud, misidentification or transmission errors, in particular by e-mail, shall be borne by the client**, **subject to gross negligence on the part of the bank** (art. 5 and 7). Art. 22 provides for a continuance of jurisdiction in favour of the Geneva courts and the application of Swiss law to relations between the parties.

On 12 April 2010, the client signed a document confirming the **discharge given to the bank for e-mail communications**.

A.b. On 31 December 2002, the client's assets with the bank amounted to CHF 105,133.41. Until 2008, these assets were placed in fiduciary investments or units of collective funds without any contributions or withdrawals being made.

In 2008, the client withdrew USD 84,711 due to the financial crisis that erupted at that time.

As of 1 January 2009, and with the exception of a portion of investment funds realized in 2010, the client's assets were allocated to two current accounts, one in Swiss francs and the other in US dollars. Their amount, in the order of CHF 15,000, did not change significantly until 2012.

A.c. As of 2007, the **client had mainly contact with the bank employee E., who spoke fluent**

English. Until 2012, **communications** between the client and the bank remained **relatively rare** and **mainly** took the form of **e-mails**. At the express request of the client, **statements of account** and **notices of transaction** were also communicated to him **by e-mail**. By e-mail of 1 January 2011, the client informed the bank of his intention to transfer USD 250,000 to the credit of his accounts in the near future, requesting the exact coordinates. Although the tone used was less formal than in a letter, **the e-mail was written in good English, in the sense that it did not contain any syntax errors, nor were any articles omitted and the terms used were precise and appropriate**.

The previously mentioned bank employee provided by e-mail the desired information. She also asked the client to tell her which bank the funds came from and what the funds originated from.

The client responded by e-mail that the funds came from a savings account held with a US bank. He also explained the proposed transfer: "I had intended to make a transfer last year but the dollar weakened against the CHF. Now that the dollar is rising, I am considering making the transfer in the near future. I am seeking to diversify a portion of my assets from dollars and will leave the money in the bank for the long term and expect to be a passive investor. Just looking for stability and safety."

The envisaged transfer did not take place.

A.d. By e-mail of 15 December 2011, the client again informed the bank of a possible transfer of funds in these terms: "Now that the dollar has strengthened against the CHF, I am prepared to send up to USD 400'000 to B. sometime after New Year's Day. I don't intend to do much trading or exchanging in the future and I am basically looking for a long-term place to hold some savings with a very defensive posture."

In the same e-mail, he asked the bank a number of questions, mainly related to the consequences of his status as a US citizen.

In its e-mail reply of 27 December 2011, the bank asked for an explanation regarding the origin of the funds.

The client replied by e-mail on 29 December 2011, reaffirming his intention to proceed with the transfer in the first quarter of 2012.

At the end of April 2012, he informed the bank by fax that he was transferring the previously mentioned USD 400,000 to his account in US dollars. Various documents, including proof of the origin of the funds, were annexed to this transmission.

Generally speaking, in these communications, being sometimes relatively long, the **client expressed himself in good English, using correct syntax** and a **variety of suitable and precise terms**.

An amount of USD 399,980 was actually credited on 30 April 2012 to the client's dollar account.

The bank acknowledged receipt by e-mail of 3 May 2012, requesting simultaneously that the client indicate his profession, his annual income and the origin of the funds deposited. The **client replied** by a long e-mail of the same day, again **written in good English**.

By a relatively short e-mail dated 7 May 2012, the client ordered the bank to close the account held by his mother for which he held a power of attorney and asked to transfer the balance to his own accounts. After having requested and obtained a confirmation of this instruction from the client's mother, the bank acted on it on 1 June 2012, crediting CHF 138,503.20 to the client's account in Swiss francs.

At that date, the amounts deposited in the client's accounts amounted to USD 399,965.38 and CHF 153,614.55 respectively.

A.e. On an undetermined date, presumably during the month of June 2012, **one or more unknown persons** (hereinafter: the **pirates**) managed, by **unidentified means**, to **take control of the client's e-mail**. This takeover **enabled them to send e-mails from the client's C.@hotmail.com e-mail address to the bank, without the client's knowledge**, and to intercept, so that the client was not aware of the e-mails sent to him by the bank at the same address.

Some terms used by pirates (such as "Dear E. ...") infer that they **had knowledge of at least some of the electronic correspondence previously exchanged**. In the legal proceedings referred to below (letter B), the **bank criticized the client for having kept all e-mails exchanged with it** (see also in section 4.3.1).

A.f. On 14 June 2012, the pirates sent the following e-mail to the bank employee E., which appeared to come from the client's e-mail: "Dear E., I do have wire transfer which I will need you to assist me take care of today, can you e-mail me wiring instruction that you will be needing to send out an international wire transfer to Hong Kong. Best regards, C. [address]"

The aforementioned bank employee responded the same day by the following e-mail, which was intercepted by the pirates: "Dear Mr C., We need the name of the beneficiary and address, the account IBAN number, the SWIFT of the bank and bank name and the signature. [...] Best regards, E."

The pirates then indicated by e-mail that the funds to be transferred - being "120'000" – were to be sent to the company H. Limited, an account holder with the bank in Hong Kong, the purpose of the transfer being the following: "Purchase of Property". About two hours later, the pirates sent the bank employee a new e-mail stating that the beneficiary's name was H. Limited and the amount to be transferred from USD 120,000. The employee replied that she had taken note of these instructions, which would be executed as soon as possible, and she understood that despite receiving two e-mails, only one transfer of USD 120,000 had to be made.

On 14 June 2012 again, the pirates sent the following e-mail: "E., I was hoping you do received my previous message to you, let me know if the transfer has been completed. Thank you,C."

On 15 June 2012, the bank made the requested transfer, of which E. informed the client – being in reality the hackers – by e-mail of the same day. The client's dollar account was debited USD 120,000 and USD 49.98 for costs, with the balance remaining at USD 279,926.13. A confirmation notice was issued to the client on the same day and kept in the bank.

By e-mail of 19 June 2012, the pirates, still pretending to be the client, questioned the bank about the delay in the transfer. At the same time, they requested a confirmation of the amount of assets in the account. The bank replied the following day, attaching a copy of the transaction notice to its e-mail.

A.g. On 25 June 2012, following a new transfer request for a significant amount, the bank sent an e-mail to the client's e-mail asking for, by fax, a signed transfer order as well as evidence of the purchase of a property and the contract with company M. Enterprise.

The same day, the pirates responded by e-mail with the following: "Dear E., Please find the requested details in attachment, am sorry I could not send a fax at the moment have been ill. Please proceed with the transfer I will have a signed note send to you as soon as am feeling much better, kindly e-mail me as soon as the transfer has been completed or if you need anything. Thanks. C."

Two annexes were attached to this e-mail: a "summary evaluation report" on a building in Malaysia, for "C. [spelling mistake]" by the Malaysian company M. Enterprise, and a statement relating to the risks of lead paint, bearing the heading "Long Island..." and mentioning the company M. Enterprise under the heading "name of the seller".

By e-mail of 26 June 2012, the bank employee replied that a signed instruction was required for such a high amount. The pirates then sent to the bank, an annex to an e-mail of the same day, a transfer order in the amount of USD 210,000 to an account held by M. Enterprise with a Malaysian bank. The **signature on this order** – written with a "C" for the first name – **had no resemblance to the sample signatures of the client that the bank was in possession of**.

By a new e-mail of 26 June 2012, the bank asked the client to send it an order bearing his signature as recorded by the bank. The pirates then responded on the next day, 27 June 2012, with the following: "I understand how you mean but is so dangerous sending my signature over the internet, I was going to send it by fax but my fax is bad at the moment. Can I send the order form through post I believe this is saver, e-mail me the go ahead if this is okay. [...]"

On 27 June 2012 the pirates, after having received from the bank the mailing address to which the signed order was to be sent, e-mailed a new payment request which was formulated as follows: "After receiving message from M. Enterprise today as there is a time limit on the property payment which is tomorrow, I was wondering if you could assist me in transferring $ 140'000 to M. Enterprise today since sending a big amount will require a signature. E-mail me as soon as possible to enable me post the order form to your address immediately. [...]"

As the bank merely confirmed its postal address, the pirates asked by e-mail of 9 July 2012 whether it had received the signed authorization allegedly sent by post. Having obtained a negative answer to their question, they made, again by e-mail, a new request for a transfer in the following terms: "Oh my God, I believe you should have gotten it by now I don't understand what seem the problem I will have to confirm from the post as soon as am back in town. I just lost my cousin am presently out of town, I will really need your help right now could you assist me in completing an international wire transfer for the total amount of $ 110'000. [...]"

These repeated and insistent requests for the first time started to arouse a certain suspicion in the bank employee. She refused the new request of 9 July 2012, emphasizing the need to receive a signed instruction and further stated in the client's internal file that only the orders bearing his signature could be executed. Subsequently, the employee's mistrust was reinforced by various inconsistencies in communication with the client, which she wondered "what he was playing at". This suspicion was directed against the client himself, the employee never having considered the possibility of a piracy of his e-mail by third parties.

A.h. By e-mail on 12 July 2012, the client (not the pirates) announced to the bank his intention to transfer to his Swiss franc account the proceeds of a life insurance policy maturing on 5 August 2012, for an amount of approximately of CHF 161,000. By this same e-mail, written in good English, the client asked the bank to send him the notice of operation concerning the closure of his mother's accounts and asked the following question: "Does the bank have any opinion on the imposition of capital controls or what form they might take? The dollar has risen in the past several months and I eventually will convert the 400K I wired a few months ago to CHF; but of course I'm trying for the best possible rate. [...]"

The bank replied by e-mail on 13 July 2012, sending to the client the account statements as of 30 June 2012 and stating that it had no opinion on the issue of possible capital controls.

This response was intercepted by the pirates. They then sent an e-mail message to the client

from an e-mail address very similar to that normally used by the bank employee (E.@B.co instead of E.@B.ch). The contents of this e-mail, also dated 13 July 2012, were identical to the true response of the bank except for two modifications made by the pirates: On one hand, the account statements as of 30 June 2012 were not attached; on the other hand, the e-mail instead of responding to a question from the client indicated that due to a new policy these extracts could only be sent once a signed letter of authorization had been sent by fax to a given number.

The client then sent a letter to the bank, to which were attached the signed authorizations allegedly required, the documents justifying the origin of the funds which he intended to transfer to his account and a copy of the exchange of e-mails of the 12 and 13 July 2012 (including the bank's response as amended by the pirates). In this letter, received by the bank with its annexes on 20 July 2012, the client requested a response to the questions posed in his e-mail of 12 July 2012, when the bank had already replied by e-mail of 13 July 2012, the content of which had however been modified by the pirates.

A.i. The pirates again contacted the bank by e-mail on 23 and 24 July 2012 to discuss the upcoming arrival of life insurance amounts, to announce a transfer order to Singapore and to request information on the details needed by the bank in order to execute it. By e-mail of 24 July 2012, the bank requested a signed order.

On 31 July 2012, the pirates faxed a bank order (actually an authorization) to the bank to transfer USD 185,000 to H. Limited's bank account in Hong Kong, mentioning the following reason for the transfer: "to balance the property purchased". This order bore the reproduction of a signature corresponding to the signature samples of the client in the possession of the bank. The manner in which the pirates procured this signature has not been established.

On receipt of this order, the bank made the required transfer. The client's dollar account was debited on 31 July 2012 in the amount of USD 185,000 and USD 27.86 (bank charges), with the account balance no more than USD 94,904.73. A confirmation notice was issued on the same day to the client.

On 2 August 2012, the client's Swiss franc account was credited with CHF 161,165, corresponding to the income from the life insurance maturing. By e-mail of the same day - intercepted by the pirates- the bank informed the client of this.

A.j. On 8 August 2012, the pirates sent the bank an e-mail asking it to make a further transfer to H. Limited's account with the bank [...] in Hong Kong, this time for an amount of CHF 230,700. As a justification, the desire to move forward with investment in a piece of property was given. On the same day, they sent to the bank by fax a transfer authorization in accordance with this instruction bearing the reproduction of a signature corresponding to that of the client.

The bank executed this instruction the same day. On 8 August 2012, the client's Swiss franc account was debited in the amounts of CHF 230,700 and CHF 27 (fees). A confirmation notice, dated the same day, was issued to the client.

A.k. On 15 August 2012, the pirates sent via e-mail a new transfer request to the bank for an amount of CHF 83,000. The intended recipient was a named X., domiciled in Singapore; the funds were to be transferred to an account held by him at a banking institution in Singapore. The bank requested a signed transfer order, the indication of a reason and a supporting document. The pirates then faxed to the bank an authorization to transfer the funds bearing the reproduction of a signature corresponding to that of the client, as well as an invoice of 14 August 2012 with the heading of a company entitled X. Property, established in the name of the

client for an amount of CHF 83,000 corresponding to a payment for a property in Singapore.

On the following day, 16 August 2012, the bank executed the transfer order and debited the Swiss franc account of the client in the amounts of CHF 83,000 and of CHF 15 (fees). A confirmation notice was issued on the same day to the client.

A.l. Following an exchange of e-mails on 19 August 2012 with the e-mail address E.@B.com (the one opened and controlled by the pirates), the client became aware of the deceit. By two e-mails on 23 August 2012, he informed the bank and asked it to block his accounts. At the same time, the client called the bank employee, who informed him of the debits on his accounts. He disputed having given the corresponding transfer instructions. On 27 August 2012, the client presented himself at the bank's premises, where he was given all the electronic correspondence exchanged between the bank and the e-mail address C.@hotmail.com. He also handed the bank a letter contesting that he had ordered the debits of his accounts and had become aware of them.

The same day, he filed a criminal complaint in Lausanne. He did the same in Hong Kong the following month.

By letter of 27 September 2012, the client's lawyer ordered the bank to pay the amounts of USD 305,077.84 and CHF 313,742 to the client's accounts within ten days, which it did not do.

B.a. The client brought the matter before the Conciliation Authority on 4 February 2013 and filed an application with the Tribunal of First Instance of the Canton of Geneva on 17 June 2013, concluding that the bank should be ordered to pay him, with interest, the amounts of USD 120,049.98, USD 185,027.86, CHF 230,727 and CHF 83,015.

B.b. In parallel to this procedure, the client filed a restitution action in the Hong Kong courts against the company H. Limited and its director. The latter, condemned initially by two judgments pronounced by default, have found the shortcomings. The parties finally entered into a deal in which the client waived a portion of the procedural indemnities granted to him under the default judgments rendered. On 25 July 2014, the company director and the administrator paid to the client an amount of USD 304,995.19 (corresponding to the addition of the amounts of USD 120,000 and USD 185,000 transferred on 15 June and 31 July 2012, subtracting USD 4.81 for bank fees), CHF 230,694.52 (corresponding to the sum of CHF 230,700 transferred on 8 August 2012, subtracting CHF 5.48 in bank fees) and HKD 11,611.80 (related to lawyer and procedural fees).

After allocation of this participation, the attorneys' and legal fees incurred by the client in connection with the proceedings in Hong Kong amounted to USD 39,909.59.

In light of these developments, by an act dated 31 July 2014, the client modified the conclusions reached before the Court of First Instance of the Canton of Geneva, now requesting that the bank be ordered to pay him:

- in connection with the transfer of USD 120,000 on 15 June 2012: USD 49.98 plus interest for repayment of incorrectly drawn bank fees and USD 12,164.38 for accrued interest on the capital between 15 June 2012 and 25 July 2014;
- in connection with the transfer of USD 185,000 on 31 July 2012: USD 27.86 plus interest for repayment of incorrectly drawn bank fees and USD 18,347.95 for accrued interest on the capital between 31 July 2012 and 25 July 2014;
- in connection with the transfer of CHF 230,700 on 8 August 2012: CHF 27 plus interest for repayment of incorrectly drawn bank fees and CHF 22,659.17 for accrued interest on the capital between 8 August 2012 and 25 July 2014;

- in connection with the transfer on 16 August 2012: CHF 83,015 plus interest;
- in connection with the proceedings in Hong Kong: USD 39,909.59 plus interest for repayment of accrued lawyer fees and court costs.

B.c. By judgement of 10 August 2015, the Court of First Instance ordered the bank to pay the client the amounts of USD 49.98 plus interest and of USD 12,164.38 (ch. 1 of the arrangement), of USD 27.86 plus interest and of USD 18,347.95 (ch. 2), of CHF 27 plus interest and of CHF 22,659. 17 (ch. 3), of USD 39,909.59 plus interest (ch. 4) and of CHF 83,015 plus interest (ch. 5).

The Court of First Instance held essentially that, in spite of serious indications of abuse with regard to the received transfer orders, the bank had committed a serious error precluding it from benefiting from the risk transfer clauses found in the contractual documentation. It also had to remedy the damage it had wrongly caused the client by reimbursing him for the costs he had incurred in the proceedings opened in Hong Kong.

B.d. By a judgment of 10 June 2016, the Civil Division of the Court of Justice of the Canton of Geneva partially admitted the appeal lodged by the defendant, amending numbers 1 to 3 and 5 of the contested judgement to the sense that the defendant was ordered to pay to the claimant the amounts of USD 49.98 plus interest and of USD 10,800, the amounts of USD 27.86 plus interest and of USD 16,650, the amounts of CHF 27 plus interest and of CHF 20,763, as well as the amount of CHF 83,015 plus interest. The judgment in the amount of USD 39,909.59 plus interest (ch. 4 of the challenged judgement) was also confirmed.

C. On 20 June 2016, the defendant applied to the Federal Court for a suspensive effect on a super-provisional basis, which the President of the Court, after having gathered the determinations of the applicant and the previous authority, rejected by order of 15 July 2016.

By an act of 16 August 2016, the defendant filed an appeal in civil proceedings, concluding preliminarily to the granting of the suspensive effect and mainly to the change of the judgment in the sense that the applicant would be disallowed all his conclusions.

The applicant concluded preliminarily that the application for suspensive effect should be dismissed and, in particular, that the appeal should be dismissed. The relevant authority referred to its judgement.

By order on 3 October 2016, the president of the court dismissed the request for suspensive effect.

II. Legal Considerations

[…] 2.1. The defendant alleges that the cantonal judges infringed ss. 100[1] and 101[2] of the Swiss Code of Obligations (hereinafter "CO") on the ground that serious misconduct was committed in the execution of the fraudulent transfer orders, and that their legal analysis of the facts is erroneous and contradictory.

The Geneva judges held that the **instructions given to the defendant bank** by e-mails on 14 June 2012 **were unusual in five respects** – which the defendant contests; while conceding that it could not be recognized with any degree of certainty that the instructions received from the C.@hotmail.com e-mail address did not actually come from the client, the judges nevertheless found that the **divergences from the applicant's normal behavior should have given rise to doubts as to the legitimacy of the person giving the order**. These **doubts should have led the bank to carry out additional checks before executing the instructions received**, for example by inviting the client to make contact by telephone.

2.2.1. By **opening a bank account**, the **bank agrees to deliver all or part of the available assets to the client**, according to the **terms agreed upon**. The **execution by the bank of an order to remit or transfer an amount from these assets** has its **basis in the aforesaid relationship, even if the order is given improperly or if it is falsified**.

2.2.2. **In principle**, the **bank bears the risk of an executed service through the debiting of the account in favor of an unauthorized person**; **it** alone **suffers damage because it is obliged to pay a second time**, to its client, the amount concerned. When the **client demands the return of the asset into the account**, he **takes an action in execution of the contract, which is not subordinated to the existence of a fault of the bank**.

In effect, **if the bank acts in pursuance of an order from its client**, it **acquires a claim against the latter in reimbursement of the amount debited, as expenses relating to the due regular execution of the mandate** (art. 402 CO[3]). On the other hand, **this is not the case if the instruction from which it arises comes from an unauthorized third party**. In this scenario, the **bank bears the risk of improper payment**; it is then obliged to pay a second time, to its client, the amount concerned in execution of the contract.

2.2.3. It is, **however**, customary that the **general conditions of the banks include a risk**

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1 **Art. 100 CO: Failure to perform / II. Scope of liability and compensation / 2. Exclusion of liability**
1 Any agreement purporting to exclude liability for unlawful intent or gross negligence in advance is void.
2 At the discretion of the court, an advance exclusion of liability for minor negligence may be deemed void provided the party excluding liability was in the other party's service at the time the waiver was made or the liability arises in connection with commercial activities conducted under official license.
3 The specific provisions governing insurance policies are unaffected.

2 **Art. 101 CO: Failure to perform / II. Scope of liability and compensation / 3. Liability for associates**
1 A person who delegates the performance of an obligation or the exercise of a right arising from a contractual obligation to an associate, such as a member of his household or an employee is liable to the other party for any loss or damage the associate causes in carrying out such tasks, even if their delegation was entirely authorized.
2 This liability may be limited or excluded by prior agreement.
3 If the obligee is in the obligor's service or if the liability arises in connection with commercial activities conducted under official license, any exclusion of liability by agreement may apply at most to minor negligence.

3 **Art. 402 CO: Effects / III. Obligations of the principal**
1 The principal is obliged to reimburse the agent for expenses incurred in the proper performance of the agency contract plus interest and to release him from obligations entered into.
2 The principal must also compensate the agent for any loss or damage incurred in performance of the agency contract unless the principal can prove that the damage occurred through no fault of his own.

transfer clause under which the damage resulting from a lack of legitimation or from an undetected falsification is, **except when there is a serious error of the bank**, **borne by the client**; by virtue of this stipulation, the risk a priori assumed by one is transferred to the other.

2.2.4. Art. 100 CO, which governs the exclusive agreements of liability for non-performance or imperfect performance of the contract, applies by analogy to a **clause of this type**. **The latter is therefore from the outset irrelevant if fraud or serious misconduct are attributable to the bank** (art. 100 para. 1 CO). In addition, a judge may hold a clause invalid which releases the bank from all liability in case of slight negligence, insofar as the activity of the bank is related to the exercise of an industry licensed by an authority (art. 100 para. 2 CO). Within the scope of its discretionary powers in the application of the rules of law and fairness (art. 4 Swiss Civil Code, hereinafter "CC"), the **judge examines the transfer of responsibility clause taking into account other elements of the contract and of the set of circumstances of the particular case**. This discretionary power does not exist if the slight negligence was committed by an employee of the bank, since the risk transfer clause is then applicable without restriction (art. 101 para. 3 CO).

2.2.5. The **violation of elementary rules of prudence**, the observance of which would have been imposed on any reasonable person placed in the same circumstances, **constitutes serious misconduct**. On the other hand, there is a slight negligence on the part of a person who does not show the amount of prudence one might have expected of her, without, however, her non-excusable fault being considered as a violation of the most elementary rules of prudence. The judge assesses (art. 4 CC) the negligent person's conduct, referring to the due diligence which the other party was entitled to expect, in particular under the terms of the contract and professional practices.

2.2.6. In general, the **bank is required to verify the authenticity of orders addressed to it only in accordance with the terms agreed between the parties** or, where appropriate, as specified by law. It does **not have to take extraordinary measures**, incompatible with a rapid functioning of operations. **Although it must be aware of the existence of forgeries**, it **does not have to assume them systematically**. **It will**, however, **carry out additional checks where there are *serious indications of falsification*, where the *order does not relate to a transaction provided for in the contract or usually requested*, or where *particular circumstances give rise to doubt***.

2.3. In the present case, the **parties have agreed**, on the one hand, to allow the applicant to **transmit instructions relating to his assets by fax, telephone, telex or e-mail** and, on the other hand, to **defer to him the possible damage suffered by the defendant as a result of the execution of an order so transmitted from an *unauthorized person or of a fraudulent nature***, **subject to gross negligence on the part of the defendant**.

It is also consistent that the **transfer orders executed by the defendant** on 15 June, 31 July, 8 August and 16 August 2012 were **neither from the applicant nor from another authorized person but from unknown third parties acting for fraudulent purposes**. It is **therefore necessary to determine *whether the defendant committed serious misconduct in the execution of those orders***, **in which case it could not oppose the clause involving the deferral of the damage suffered by the applicant as a result of that execution**. As the cantonal judges have rightly pointed out, this question must be examined for each transfer at issue, taking into account all the information available to the bank at that time.

2.4.1. The **order for the first transfer** was given on 14 June 2012. The judgment under appeal contains the following information on the information available to the defendant (see letters A.c to A.e supra):

The client had indicated that he practiced the profession of "paralegal" in a large US law firm and earned about USD 90,000 a year. The banking relationship initiated with another institution which was subsequently taken over by the defendant lasted for more than twenty years. In the course of the last ten years, the client had made only one withdrawal in 2008, for a significant amount. Since then, until 2012, the assets deposited into his accounts have remained relatively small. The client had signed a waiver covering e-mail communications and it was mainly through this means that relatively infrequent contacts took place. The language used in these e-mails was consistent with what might be expected of a person practicing a legal profession, in that he respected the rules of syntax and spelling and used precise and appropriate terms.

At the beginning and then at the end of 2011, the applicant announced his intention to credit his dollar account with a significant amount, representing a portion of his wealth. Spontaneously and in **good English**, he **explained this transfer** by the desire to diversify his assets by making a long-term investment in a search for stability and security. At the end of April 2012, the discussed funds were effectively transferred to the applicant's dollar account. Moreover, during the month of May, the accounts of the applicant's mother were closed and their positive balance transferred to the Swiss franc account of the applicant.

The assets deposited by the applicant with the defendant thus experienced a very significant increase during the first half of 2012; the applicant asserted a **desire for diversification** and a **concern for stability and security over the long term**.

2.4.2. On 14 June 2012, the **defendant received several e-mails originating in fact from pirates** who ordered to transfer USD 120,000 to a company's account with a bank in Hong Kong. The cantonal court held that these instructions were unusual in five respects, which the defendant contests; these five points should therefore be examined.

2.4.2.1. In the first place, it must be noted with the cantonal court that the **language used, namely an English language with syntax errors, spelling errors** (par ex. "I was hoping you do received", which combines both grammar and spelling errors) and an approximate **vocabulary, is clearly distinguishable from that which can usually be expected of a lawyer speaking in his mother tongue, and in particular from that used by the applicant in his previous e-mails**, for example those of 29 December 2011 and 3 May 2012, which are in good English, do not contain syntax or agreement errors, do not omit articles and pronouns and use precise and appropriate terms, in contrast to the e-mails sent by the pirates on 14 June 2012.

2.4.2.2. Secondly, as the Court of Appeal notes, in the last ten years this was only the second **transfer** order from the applicant, and was **the first in favor of a third party**, moreover to a **country other than Switzerland or the United States**. The defendant incorrectly contends that the scarcity of movements precludes the existence of a normal or habitual situation in respect of which the transaction might appear unusual. Indeed, it is clear that a **sudden transfer order to a Hong Kong-based company, after ten years of steady growth in positions with a view to security and stability** – with a single significant withdrawal of USD 84,711 completed in 2008 on the grounds of the financial crisis that occurred at that time – **appeared unusual**.

2.4.2.3. Thirdly, **the transfer order involved a significant portion** (more than a quarter) **of the funds** deposited by the applicant one and a half months earlier into his own account with the **explicit intention of retaining them in the long term in an essentially conservative perspective**. ("I am basically looking for a long-term place to hold some savings with a very defensive posture."). The defendant incorrectly objects that inconstancy would have been the rule with regard to the applicant since he had not transferred the USD 250,000 he announced on 10 January 2011 and that the USD 400,000 he announced on 15 December 2011 for the end of the year was only paid at the end of April 2012. There is no discernible inconstancy in the behavior of the applicant, which on the contrary appears to be reflective and consistent; the fact of having withdrawn nearly 90% of its assets in 2008 due to the financial crisis confirms a **clear aversion to risk, hardly compatible with a sudden investment in Hong Kong using more than a quarter of the amount** transferred by him to his account just a month and a half previously with the explicit intention of keeping it there in the long term from an essentially conservative perspective.

2.4.2.4. Fourth, the **instructions to a third party** did **not contain any explanation of the purpose of the transfer**, except that it concerned the acquisition of real estate; **nor did they give the reason that led the applicant to alter his initial intentions**. Yet, the applicant had always been careful to inform the bank of his reasons, for example, delaying his transfer in order to obtain a more favourable exchange rate, or intending to diversify the currencies in which he kept his fortune. The defendant cannot avoid the fact that a client does not have to give detailed explanations of the transfers he intends to make, particularly in this case as the applicant had always stated his intentions in the long term, which were still recalled in his e-mail of 15 December 2011, in which he explained that he wanted to retain in the long term his new contribution of USD 400,000, from an essentially conservative perspective.

2.4.2.5. In the fifth and last place, the **instructions indicated a certain temporal urgency**, the transfer needing to be carried out the same day. This sense of urgency was reinforced by the sending of several e-mails at short intervals, without the exact reasoning being ever explained. **Such a course of action was unusual for the applicant**, and it does not appear that he ever placed the defendant under time pressure. Here too, the defendant attempts in vain to take refuge behind the scarcity of orders given in ten years, which would exclude the establishment of any habits of the applicant. On the contrary, sending several e-mails at very close intervals with a view to making a large transfer to a third party in Hong Kong contrasted markedly with the applicant's deliberate behaviour as reflected in his previous correspondence with the bank throughout the duration of the contractual relationship.

2.4.3. Like the cantonal court, it must be admitted that **these various factors, taken together, and in particular the divergences from the normal conduct of the applicant**, which the defendant could have observed in the relations with the client up until then, **should have aroused doubts about the legitimation of the originator**, doubts which should at least have led it to carry out additional checks before executing the instructions received, for example by inviting the applicant to make contact by telephone.

Contrary to the defendant's contention (see para. 2.1 above), the cantonal judges did not go into the contradiction by conceding that the defendant could not recognize with any degree of certainty the piracy of the e-mail address C.@hotmail.com, while reproaching him for not having doubted the legitimation of the ordering party and not having carried out additional checks. The defendant is not accused of having disregarded the fact that the instructions received on 14 June 2012 did not emanate from their apparent author, but that the **defendant ignored a whole bundle of elements which should have led it to doubt the legitimacy of the originator**, and **hence to carry out the checks necessary to remove those doubts**.

The Court of Justice has thus rightly held that the ***defendant failed to act diligently in failing to carry out checks when it was confronted with an accumulation of unusual circumstances***. The gravity of that failure must be assessed in the light of the ***diligence which the applicant could legitimately expect from a banking establishment***, taking into account, in particular, the terms of the contract and professional practices.

As stated by the cantonal judges, the ***defendant should have been able to identify the unusual and therefore potentially suspect nature of instructions drafted differently from the usual communications of the client and presenting unusual features both in the way the funds had been used up to now and in relation to the intentions previously expressed by the applicant***. In view of the banking practices and the concrete expectations which the applicant could reasonably hold, the defendant's employee's failures, which did not notice these discrepancies and did not give rise to doubts as to the legitimacy of the instructions, but instead silenced them, ***constitute gross negligence***.

2.4.4. Contrary to what the defendant pleads, the deposits (USD 399,980 and CHF 138,503.20) which the applicant had just made to his accounts were not such as to give rise to total confidence by the defendant. Unlike the fraudulent transfer of USD 120,000, the circumstances surrounding the transfers of the above two amounts were perfectly clear, as the applicant gave full explanation of their reasons and amply informed them before executing them. Moreover, the transfers were clearly in line with the applicant's strategy, while the **hasty transfer to Hong Kong did not correspond to the wish expressed by the applicant**, in seeking security and stability with a passive investment in the long term.

2.4.5. In the light of the above, the assessment of the cantonal judges according to which the defendant or its employee was guilty of grave misconduct in transferring USD 120,000 on 15 June 2012 in execution of fraudulent instructions received the previous day, escapes criticism.

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2.5.1. Between the execution of the first fraudulent order (15 June 2012) and that of the second (31 July 2012), the defendant received numerous communications, mainly from the pirates, but also from the applicant. The cantonal court noted the following:

- In response to its request for proof of purchase of real estate, the defendant received a "summary assessment report" concerning a property in Malaysia and a statement regarding the risks associated with lead paint. In addition to the fact that they did not answer the question asked, the **documents submitted contained several anomalies**: The applicant's name was misspelled, a company appeared as an expert in the first document and as a salesperson in the second, which appeared to be devoid of any connection with the sale of a building in Malaysia. Notwithstanding these inconsistencies, the defendant did not request further explanations or supporting documents;
- After requesting a signed transfer order, on 26 June 2012 the defendant received a **document bearing the initial – for the first name – "C" which had no connection with the specimen signature in the bank's possession**. Moreover, **the initialling did not correspond to the type of signature commonly used in the West**, as might be expected from a US citizen practicing a legal profession. Despite this anomaly, the defendant did not undertake any verification procedure, merely by inviting the applicant to send it a new order bearing a signature corresponding to the specimen in its possession. The repeated and insistent requests for transfers received by the defendant as a result of that refusal certainly aroused distrust of the applicant's account manager but did not lead

her to carry out further investigations;

- By e-mail of 12 July 2012, the applicant asked a number of questions to the defendant, stating in passing that he intended to convert into Swiss francs the amount of USD 400,000 transferred to his account on 30 April 2012; and on that date the available dollar amount was only USD 279,926.13 due to the USD 120,000 transfer on 15 June 2012, and the **defendant did not note this inconsistency**.

2.5.2. As the cantonal judges rightly pointed out, these **new unusual elements**, coupled with the still **observable difference in written expression between the pirates' e-mails and the applicant's writings**, should have **further reinforced the suspicions** so that the defendant should have already harbored doubt as to the legitimacy of the instructions received. This applies in particular to the **divergence of signatures on the transfer order** of 26 June 2012 and on the **specimens of authentic signature in the bank's possession**. To this was added the fact that it did not in any way correspond to current practices in the Western world, and much less so in the case of a person working as a lawyer assisting in a large American law firm. This manifest and inexplicable discrepancy alone required the defendant to carry out additional checks which would have enabled it to avoid performing transfer orders from unauthorized third parties. By failing to carry out these checks, the bank and its employee respectively have been grossly negligent. In no case could it simply refuse to execute the order received on 26 June 2012 and then execute the transfer orders received on 31 July, 8 and 15 August 2012, without carrying out an in-depth examination which would have confirmed the multiple indications of fraud described above.

2.5.3. The defendant fails to demonstrate how the foregoing assessment would be erroneous. While the applicant referred in his e-mail of 12 July 2012 to an asset of USD 400,000 and that the actual statement of account at that date was only USD 279,926, the defendant objects that this inconsistency could pass unnoticed in view of the amount of information contained in the e-mail and the complexity of the questions. The defendant further argued that this e-mail had been sent by the applicant in person from the pirated messaging, which would have had a healing effect. However, **it is not clear how the applicant's use of his own pirated e-mail could have had a healing effect, *as all the elements including the inconsistencies in style between the messages emanating from the pirates and that of the applicant should have caused the defendant to carry out additional checks***.

2.5.4. In these circumstances, the cantonal judges were well-founded in their holding the defendant grossly negligence in the execution of the three transfers effected on 31 July, 8 August and 16 August 2012.

3.1. However, the **defendant argues** that the **transfer completed** on 15 June 2012 would have been **tacitly ratified** by the applicant. The defendant observes that the case-law makes it possible to dispense with the **fiction of receiving a communication made in a bank**, except for in cases of abuse of rights, but it is also necessary that intentional conduct be attributed to the bank, which is not the case here.

3.2.1. The **general terms and conditions of banks usually stipulate that any claim relating to a transaction must be made by the client within a certain period** (usually one month) upon receipt of the transaction notice or the corresponding account statement, **failing which the transaction is deemed to be accepted**. The Federal Court has **admitted the validity of such a clause**, which implies that ***in the absence of an objection made in good time against***

a transaction carried out without instructions, the client is deemed to ratify it.

3.2.2. Where the Bank agrees by a **remaining bank agreement to keep the notices** it should send to its clients, its **communications are binding on the clients as if they had actually been received**. The client who adopts this mode of communication is supposed to have immediately taken notice of the notices addressed to him in this way; **it will be treated in the same way as the client who actually received the e-mail**, with regard to the **fiction of acceptance of an uncontested operation** within a certain time. In doing so, the client takes a risk and must bear the consequences.

3.2.3. Due to the shocking consequences which may be caused by the strict application of the fiction of mail receipt, the **judge** may **overrule it on the basis of the rules of abuse of rights** (art. 2 para. 2 CC). This is the **case when the bank takes advantage of the fiction of receiving mail to deliberately act to the detriment of the client**, or when, after having managed an account for several years in accordance with the client's oral instructions, the **bank deviates from it deliberately so that it could not have been foreseen**, or when it **knew that the client did not approve of the acts communicated**. A comparable negligence should be equated with intentional injury. The Federal Court thus held that gross negligence rendered the remaining bank clause unenforceable to the client in a case where the **bank had executed an order whose signature was totally illegible**.

3.3. On 15 June 2012, the bank issued a debit notice which it kept in the bank. On 20 June 2012, on a request actually coming from the pirates, it sent a copy of this notice by e-mail to the client's e-mail address.

As the cantonal judges rightly pointed out, it was by gross negligence that the defendant ignored the unusual nature of the transfer instructions received on 14 June 2012, which should have prompted it to make additional checks (see 2.4 above). From the moment that the suspicious instructions had been received by e-mails apparently from the client's e-mail, the **defendant should have realized that this mode of communication was susceptible to being pirated**, and that it could no longer infer that the e-mails sent to the applicant would effectively reach him. The interception of the e-mail of 20 June 2012 is **thus attributable to gross negligence** of the defendant, which **cannot therefore rely on the absence of opposition from the client and the fiction of ratification** stemming from art. 2 of the general conditions. It would be shocking to have the applicant bear the consequences of gross negligence on the part of the defendant, who, if it had done the required due diligence, would have realized that the instructions received from the applicant's e-mail address were suspect and that this address was no longer reliable. The same reasoning prevails with regard to the fiction of receipt arising from the bank clause. As the Court of Justice points out, its strict application would mean that the client would bear the consequences of the defendant's lack of vigilance, who should have realized that the transfer instructions were suspicious and might not be ratified by the client. Furthermore, the Court did not infringe federal law in considering that serious negligence could also defeat the bank clause.

4.1. The **defendant maintains that the applicant's claims for the return of the entrusted sums should be rejected on account of the serious misconduct which he allegedly committed by retaining his electronic bank correspondence in his Hotmail e-mail account**. The cantonal judges infringed art. 97 and 41 CO by denying the existence of such a fault on the basis of a manifestly incorrect finding of fact. In this regard, the judges unduly held that the **mere deletion of the messages concerned would not necessarily have prevented**

the pirates from becoming aware of them and that, moreover, the retention of these messages had not been established (see 1.2 supra).

4.2. According to the case-law, the claims of a client for the return of a sum deposited with a bank extend to the performance of the contract and not to obtaining damages and interest. Accordingly, the rules on the reduction of compensation for contributory fault (art. 99 para. 3 and 44 para. 1 CO) do not apply directly. This does not mean, however, that any **serious fault on the part of the creditor would not affect the fate of his claims**, which may on the contrary be reduced or even rejected on that account. The legal basis for such a reduction (or such a rejection) may lie either in a contractual fault (art. 97 para. 1 CO, for example, art. 1132 CO concerning the drawer's fault), or in an unlawful act committed by the creditor himself (art. 41 CO, e.g. collusion between the account holder and the third party issuing a falsified order), in which case the bank has a claim for compensation against its co-contracting party.

4.3. In the present case, the cantonal court **waived its consideration of whether keeping electronic correspondence with a bank in an e-mail account could constitute culpable recklessness**. Consequently, on the one hand, such a conversation did not follow from the file. On the other hand, it was **not established that the mere deletion of the messages concerned would have prevented the pirates from becoming aware of them; most e-mail software allows for the recovery of deleted data, and these were in any case likely to be kept in some form or another by the internet service provider**.

4.3.1. As the defendant observes, it duly alleged in its reply of 15 October 2013 that the **holder of the address C.@hotmail.com kept all his messages and attachments in his e-mail account and that anyone with the password to open the C.@hotmail.com account could access all correspondence with the bank**.

4.3.2. The defendant contests that the e-mail software makes it possible to retrieve erased data and that it can in any case be kept in some form by the Internet access provider, a statement from which the cantonal judges have deduced that the deletion of the messages concerned would not necessarily have prevented the pirates from becoming aware of them. The defendant objects that, to the extent that it was established that the applicant retained his messages on his e-mail account, it was incumbent upon him to prove that the deletion of the messages concerned would have prevented the pirates from becoming aware of them, which he did not do.

According to art. 8 CC, each party shall, if the law does not require otherwise, prove the facts alleged by it to establish its right. This rule is considered to be the basic principle in the distribution of the burden of proof in federal private law. According to the approach of the dominant doctrine, which follows the theory of norms (Normentheorie), the relationship between the applicable material norms determines the distribution of the burden of proof. This relationship establishes in cases where the fact to be proved gives rise to a right (generating fact), extinguishes it, or modifies it (destructive fact), or if it keeps in check this creation or destruction (critical fact). A person who claims to be the owner of a right must prove the factual basis on which the right arises. On the other hand, it is for the person who invokes the extinction of a right or disputes its creation or its application to prove the destructive or critical facts. In the present case, the defendant intends to assert a claim for damages and interest which presupposes a hypothetical unlawful act which is not raised and which can be ruled out from the outset, or a contractual fault on the part of the applicant. **It is therefore incumbent upon the defendant to establish such a fault and the existence of a natural causal link between**

that fault and the damage on which its claim for damages and interest is based. **That being the case, starting from the moment that the applicant's retention of his electronic correspondence in his Hotmail e-mail account is regarded as established and that it is not disputed that this retention constituted a precondition of the occurrence of the damage, it is incumbent upon the applicant to prove the fact that constitutes the severance of the causal link, namely that the pirates, through access to his e-mail account, could also have read deleted messages**. However, it does not appear that the applicant has alleged and established such a possibility, which could not be accepted without further action since it does not constitute a well-known fact.

4.4. The above considerations do not, however, lead to the conclusion that the applicant committed a preponderant contractual fault which would justify reducing or rejecting his claims for the restitution of the sums entrusted to the defendant. **In that sense, it will be shown below that no analogy can be made with the precedent cited by the defendant, in which the bank's client was accused of wrongful conduct for leaving bank documents freely accessible in the office of his house, to which he had given the keys to his guests, who let visitors come in who client was not in control of and about whom he was so mistrustful of that he felt threatened**.

As the cantonal judges have pointed out, it is in no way established in this case that the applicant has insufficiently protected his e-mail; it is unclear how the pirates managed to take control of it and, consequently, the measures that would have prevented this takeover. The defendant's argument is based on mere conjecture (insufficiently complex password, access by unprotected computers, etc.), which presupposes that if third parties have been able to take control of the applicant's e-mail account, that he did not take the security measures that could be expected of him. However, this assumption is wrong. It is indeed well known that in recent years, many government departments and private companies, which could reasonably be expected to have taken reasonable precautions to protect themselves against such an eventuality, fell victim to computer hacking attacks that were carried out by ill-intentioned third parties. It cannot therefore be assumed without further examination that a takeover such as that suffered by the applicant necessarily implies a lack of diligence on his part.

Thus, the situation of a client who cannot be blamed for taking insufficient precautions to prevent access to his password-protected e-mail is not at all comparable to that of a client who leaves his bank records freely accessible in the office of his house that is frequented by visitors of whom the client neither has control over nor trusts.

In any event, even if a fault was attributed to the applicant, it would be necessary in that case to take into consideration the manifest disproportion between that slight fault and the gross negligence committed by the defendant, which would lead to refusing the latter the award of damages and interest in accordance with art. 44 para. 1 CO applicable under art. 99 para. 3 CO.

5.1. The defendant disputes the obligation to reimburse the applicant for judicial and legal costs incurred in connection with proceedings he instituted before the courts of Hong Kong. The defendant also contests the obligation to pay interest on the disputed transfers of USD 120,000, USD 185,000 and CHF 230,700. The previous authority erroneously applied the rules on business management without authorization (art. 419 ss. CO) and ought to have challenged the applicant in the transaction in which he waived part of his claims.

5.2. Art. 422 para. 1 CO stipulates that when the best interest of the principal requires that the management be undertaken, the principal must reimburse the agent for the full amount with interest for all his necessary and useful expenses as justified by the circumstances. This provision may be invoked by a person who has given the necessary care to his or her management even if the desired result has not been obtained (art. 422 para. 2 CO). The agent acting without authorization is liable for negligence or recklessness (art. 420 para. 1 CO). However, his responsibility must be assessed with less rigor when he handled the principal's affairs in order to prevent damage threatening the principal (art. 420 para. 2 CO). With regard to the principal (art. 400 CO), the agent is obliged to report on his management and to hand over to the principal what he has received for him (art. 419 and 420 CO).

5.3. The cantonal judges essentially made the following analysis: the judicial and legal costs incurred by the applicant in respect of the proceedings before the courts in Hong Kong did not amount to injury in a natural and adequate causal relationship with a breach of contractual obligations by the bank. To the extent that it had not validly relinquished its obligation to return the funds deposited or lent by the applicant, the bank had never ceased to be the applicant's debtor. The applicant had not suffered any damage as he remained a creditor of the bank and thus did not have to incur legal and legal costs in order to reduce non-existent damage. However, by acting against the alleged perpetrators of fraudulent orders before the Hong Kong courts, the applicant intended to recover the stolen funds in the event that his claim against the defendant was not recognized. He admitted, on the other hand, that, should he win the case against the defendant, he would make the latter benefit from the sums recovered at the end of the proceedings instituted in Hong Kong; he had, moreover, modified his conclusions to that effect once those procedures had been completed and the amounts actually obtained. In doing so, the applicant had, at least on a contingent basis, managed the affairs of the defendant without authorization within the meaning of art. 419 CO (ATF 112 II 450 para. 5).

In addition, the cantonal court continued, the management had been done in the interest of the principal, since it enabled the defendant to recover, by way of an offset against the applicant's claims against him, the sums transferred without valid authorization on 15 June, 31 July and 8 August 2012, from which he suffered financial loss. In accordance with art. 422 para. 1 CO, the defendant was therefore obliged to reimburse the applicant, in principal and interest, the judicial and legal costs incurred by him, the necessity of which, or at least their utility and justification, was not disputed.

5.4. Before the Federal Court, the defendant no longer appears to argue that the applicant mismanaged its interests by making the impugned transaction and thus incurred responsibility within the meaning of art. 420 para. 1 CO. On the other hand, it notes that the applicant did not allege or prove that it was not in a position to act itself either, or respectively, that he would have been prevented from seeking its opinion before signing the transaction excluding the reimbursement of costs and interest. However, as the applicant correctly points out, the defendant admitted in appeal proceedings only that the orders at issue were fraudulent. One can therefore infer that throughout the proceedings of first instance, it had no intention to act against computer hackers in so far as it did not recognize that the applicant had been the victim of a piracy. Moreover, the terms of the transaction were favorable to the applicant (who at that time was not yet certain of managing the bank's affairs), respectively to the defendant, in that they removed the uncertainties related to the relief proceedings then under way while safeguarding the convictions obtained on the merits, guaranteed the execution of the said

convictions and avoided the judicial and legal costs that would have resulted from the pursuit of the relief procedures. Moreover, the defendant cannot in good faith criticize the applicant for not having obtained or sought its authorization before concluding this agreement whilst it considered that the client had to bear the prejudice caused by the fraudulent transfer orders, did not feel concerned by the proceedings against the alleged perpetrators of these orders. In the light of the foregoing, the defendant's obligation to pay legal fees is beyond criticism in relation to the management of cases without authorization.

5.5. With regard to the payment of default interest in connection with the transfers of USD 120,000, USD 185,000 and USD 230,700, the defendant erroneously argues that the interest waiver contained in the transaction in Hong Kong would be against the applicant under art. 2 CC and the prohibition of venire contra factum proprium. Indeed, the applicant, by entering into a foreign agreement with third parties under art. 419 CO did not, however, renounce his claim arising from an action for enforcement against the bank and still had the right to claim payment of default interest against it.

Moreover, contrary to the defendant's contention, art. 114 CO is not applicable either. Effectively, the principal obligation of the defendant to the applicant lies in the action for execution arising out of the contractual relations between the parties. This obligation is not extinguished by virtue of the transaction which the applicant has made in Hong Kong: In acting on the basis of the management of affairs without authorization, it extinguished a claim of the defendant against the company H. Limited and its administrator, but his own claim against the defendant remained. This claim was extinguished in respect of the capital by the claim of the defendant resulting from the management of affairs (art. 400 CO by analogy), but default interest on the claim of the applicant remains due.

6. It follows from the foregoing that the appeal must be dismissed.

III. Summary

The Federal Court confirmed in a long judgment the responsibility of a bank for executing instructions from hackers.

In June 2012, the hackers managed to take control of the client's e-mail and sent various messages and instructions to the bank, some of which impersonated the client's signature (without it being possible to determine how the hackers had obtained this signature), leading the bank to make transfers from mid-June to mid-August 2012.

The bank clerk identified some oddities, but did not consider the possibility of hacking.

This judgment applies the classic principles of Swiss law, namely that the risk of unauthorized debiting is borne by the bank, that the bank's general terms and conditions may validly stipulate a risk transfer clause, that, in accordance with the Swiss Code of Obligations, such a clause does not apply in the event of gross negligence on the part of the bank and that serious misconduct constitutes a violation of elementary rules of prudence which would have been complied with by any reasonable person placed in the same circumstances.

In the case at hand, the bank failed to act diligently in failing to carry out checks when it was confronted with an accumulation of unusual circumstances. The gravity of that failure had to be assessed in the light of the diligence which the applicant could legitimately expect from a banking establishment, taking into account, in particular, the terms of the contract and professional practices.

The Court came to the conclusion that the bank should have been able to identify the unusual and therefore potentially suspect nature of the instructions that were drafted differently from the usual communications of the client and presented unusual features both in the way the funds had been used up to that point and in relation to the intentions previously expressed by the applicant. In view of the banking practices and the concrete expectations which the customer could reasonably hold, the bank's employee's failure to notice the discrepancies, along with the fact that such discrepancies did not give rise to any doubts in the bank employee's mind as to the legitimacy of the instructions, and that the employee instead remained silent, constituted gross negligence. Consequently, it was ultimately the bank who had to bear the damage caused by the hackers.

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WHO IS FRORIEP?

Founded in Zurich in 1966, Froriep is one of the leading law firms in Switzerland, with offices in Zurich, Geneva and Zug, as well as foreign offices in both London and Madrid, serving clients seeking Swiss law advice.

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