

CASE NOTE: LITHUANIA

CASE CITATION:

Z.S. v AB Lietuva taupomasis bankas, Civil Case No. 3K-3-390/2002

NAME AND LEVEL OF COURT:
Civil Chamber of the
Supreme Court of Lithuania

MEMBERS OF THE COURT:
Judges Česlovas Jokūbauskas
(chairman of the chamber),

Artūras Driukas (judge
rapporteur) and Egidijus
Laužikas

DATE:
20 February 2002

On 20 February 2002 the Civil Chamber of the Supreme Court of Lithuania, consisting of judges Česlovas Jokūbauskas (chairman of the chamber), Artūras Driukas (judge rapporteur) and Egidijus Laužikas, on the basis of the appeal in cassation of the defendant, AB Lietuva taupomasis bankas, which called for the review of the decision of 13 June 2001 of the chamber of judges of the civil division of Vilnius regional court, which was adopted pursuant to the action for damages brought by Mr. Z.S., adopted the decision which is summarized below.

Facts

On 20 August 1999 Mr. Z.S. and AB Lietuva taupomasis bankas signed a contract regarding the issuing and servicing of a Maestro payment card. On 26 and 27 August 1999, Mr. Z.S. deposited LTL 49,000 (forty nine thousand litas, approximately €14,190) in cash to his account connected to the payment card. On 29 August 1999 almost all the money (LTL 48,423.52) was withdrawn from various ATM machines in Poland. Mr. Z.S. claimed that he did not withdraw the money and demanded that the bank compensate him for the sums that were the withdrawn. The bank refused to do so, and Mr. Z.S. initiated legal action, claiming that the bank's refusal to compensate him for the withdrawal of the money caused him damage.

The procedural history

On 26 March 2001 Vilnius 2nd district court dismissed the claim by Mr. Z.S. claim for damages on the basis of absence of either fault or lack of care or negligence on the part of the bank or its employees. Mr. Z.S. appealed, and on 13 June 2001 a chamber of judges of the civil division of Vilnius regional court upheld the appeal. The Vilnius regional court established that first, it is impossible to withdraw money only with a PIN (without the card) and second, that the defendant failed to prove that the original card was used together with PIN for the withdrawal of the money.

In cassation, the bank appealed the decision of the Vilnius regional court on the following grounds:

1. the court transferred the burden of proof to the defendant unduly;
2. the court was incorrect in assessing the role of the PIN;
3. the court erred in making assumptions on the facts of the case because it was not proven that a forged card was used for withdrawals;
4. the court's conclusion that such payment cards are unduly protected from forgery due to lack of an in-built micro chip does not correspond to the requirements applicable within the EU;
5. the activities of the claimant and his failure to act, or both the activities of the claimant and his failure to act (Mr. Z.S. reported the missing amounts ten days after the withdrawals took place; it was alleged that Mr. Z.S. reported the withdrawals to the bank after the video records of the actual withdrawals were erased) did not fulfil the general criteria of fairness, reasonableness and honesty, as established by the Lithuanian Civil Code.

Main issues

Civil liability of the bank

The Supreme Court ruled that the banks, being specialized financial institutions, are obliged to act prudently and carefully in their professional activities, and such obligation results in the banks' general obligation to ensure the reliability, effectiveness and safety of their activities. The court reiterated that, in accordance with the article 2(1) of the Law on commercial banks of the Republic of Lithuania, a bank is obliged to assume the risks and liability which stem from the nature of the bank's services. Therefore, the assumption of the risks and liability means that the bank bears the burden of risk of possible damages (losses) that may occur due to the insufficient reliability, effectiveness and safety of the bank's activities.

The court concluded that the civil liability of a bank arises not only when it commits any unlawful actions, which violate the statutory or contractual obligations of a bank, but also when a bank fails to fulfil its general duty to ensure that the activities of the bank are sufficiently reliable, effective and safe enough to eliminate the risk of possible damages (losses). The court reiterated that the position regarding the liability and general responsibility to ensure the reliability, effectiveness and safety of the activities of a bank constitutes the consistent practice of the Supreme Court of Lithuania, (see the decision of the Supreme Court in case No. 3K-3-1345/2000 UAB 'Vileka' v AB bankas 'Snoras' and case Nr. 3K-3-645/2001 A. T. v AB bankas 'Snoras').

The court stated that the issuing and servicing of the electronic payment cards constitutes a part of the professional activity of the bank. Therefore, a bank, which issues an electronic payment card, is obliged to ensure the reliable, effective and safe functioning of its electronic payment system. By operating systems that are insufficiently safe and do not preclude the use of forged electronic payment cards, as well as systems that do not ensure the protection of the data required for the formation of payment orders, the bank assumes the risks stemming from the operation of such an insecure system. The court concluded that a bank may eliminate its liability fully or in part if it proves that it has fulfilled the general duty to ensure the protection from forgery or if it proves that the damages arose because of fault of a cardholder, or due to unforeseen events occurring beyond the control of the bank.

The burden of proof

The court reiterated that the burden of proof in civil procedure is distributed in accordance with the general presumption of good faith of both parties of the civil transaction and depending on each party's capacity to prove their claims. The court also reiterated that banks are generally responsible for the administration of electronic payment systems and, therefore, banks are responsible for the security of these systems; banks are obliged to act prudently and carefully.

The court stated that a cardholder cannot shape or influence in any way the safety of the bank's electronic payment system. Therefore, it is for the bank to prove that the system's safety measures were neutralized and that the conditions that are necessary for the formation of the payment order were abused because the customer was at fault, whereas the cardholder is not in a position to prove the lack of fault on his part. The

court concluded that in order to establish that all of the necessary conditions were in place to initiate payment, and the security measures were neutralized with the customer's knowledge or due to the customer's negligence, it is necessary for the bank to prove the specific actions of the cardholder.

Consequently, the burden of proof shifts to the customer only where it is established that the security measures could only be neutralized with the customer's knowledge or due to the customer's negligence. Consequently, where the customer fails to prove the absence of fault, the liability of the bank may be excluded fully or in part, depending on the degree of fault of the customer.

The role of the PIN

The court stated that in cases where the electronic signature (the PIN) is used during the payment transaction, the distribution of the burden of proof should be performed taking into consideration the level of security of such an electronic signature.

In accordance with article 8(1) of the Law on electronic signature of the Republic of Lithuania, the electronic signature has the same legal force as a hand-written signature in paper documents and is admissible as evidence in court only when the signature used is a secure electronic signature created with secure signature creation equipment and based on a valid qualified certificate created in accordance with the requirements of the Law on electronic signature.

If it could be established that, due to the level of security of the signature (PIN), it is *impossible* to reproduce it without the holder's knowledge or negligence, then the fact that the signature (PIN) was used may be used as evidence of the cardholder's knowledge or negligence.

If it could be established that, due to the level of security of the signature (PIN), it is *possible* to reproduce it without the cardholder's knowledge or negligence, then the fact of the use of the signature (PIN) is not a sufficient proof of the cardholder's knowledge or negligence.

Since the fact of use of the signature (PIN) is not a sufficient proof of the cardholder's knowledge or negligence, it is for the issuer of the card to prove that the cardholder either knew the card was used (and probably contributed to it), or was negligent in that they compromised the security of the card.

The burden of proof may only be transferred to the cardholder where the original PIN was used, which in accordance with the present level of equipment and in

accordance with the requirements as to the formation and usage of such a signature, could not have been reproduced without the holder's knowledge or negligence.

Therefore, should a dispute regarding the evidentiary value of the use of the PIN (a form of electronic signature) arise between a bank and a cardholder, the bank must provide evidence of specific actions (or inaction) of the cardholder, which goes to prove that the use of the PIN took place with the cardholder's knowledge or due to the customer's negligence.

Contractual limitation of liability

The court noted that the contract concluded between Mr. Z.S. and the bank regarding the issuing and servicing of a Maestro payment card provided that transactions confirmed by entering the PIN are considered appropriately authenticated and the customer is responsible for the consequences of such transactions. The court concluded that these provisions bestow greater importance to the PIN than the payment card itself. The court reasoned that these provisions of the contract establish the presumptions that, on the one hand, every transaction confirmed by entering the PIN is lawful and, on the other hand, these provisions establish the limitation of the bank's liability for the possible losses of the customer caused by such transactions.

The court also noted that the contract in question is concluded on the basis of the bank's standard form, which terms the customer (consumer) was not able to negotiate. The court concluded that the transfer of risk of loss which may be incurred due to the use of the payment card, as well as the transfer of the burden of proof of the lawfulness of payment orders successfully effected, and the transfer of the bank's statutory liability to the customer (consumer) by the means of standard contractual clauses, is groundless.

The court established that the contract regarding the issuing and servicing of a Maestro payment card unfairly negates the presumption of the professional liability of the bank, and unlawfully limits and abolishes the civil liability of the bank for damages to the customer's (consumer's) property incurred due to the activities of the bank. The court concluded that there are no grounds to rely on those provisions of the contract regarding the issuing and servicing of a payment card which violate the statutory principles of a banks' civil liability and burden of proof in cases where the issues of a banks' civil liability for the damages incurred by the customers due to the banks'

professional activity are considered.

Decision of the court

The court established that both the court of first instance and the appeal court did not comply with the rules of distribution of burden of proof and did not analyze all the relevant factual circumstances of the case.

The court provided a list of circumstances related to the card that was used, the PIN and the conditions of payments, as well as other associated circumstances, which were not sufficiently established by the lower courts.

The court concluded that the case was decided incorrectly and both judgments cannot be considered reasonable and valid.

The Supreme Court decided:

1. To annul the decision adopted on 13 June 2001 by the chamber of judges of Civil cases division of Vilnius regional court;
2. To annul the decision, adopted on 26 March, 2001 by the Vilnius district 2nd court; and
3. To transfer the case to Vilnius district 2nd court for retrial on the merits.

Commentary

The ruling of the Supreme Court clarifies the main issues of the value that a PIN and a payment card entails, as well as the distribution of burden of proof in case of a dispute between the issuing bank and the customer. In the long term, this judgment might mean that the banks will consider the application of measures that will strengthen the security of their payment systems.

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