CASE TRANSLATION: AUSTRIA

CASE CITATION NO:
OGH judgment of 29.06.2000, 2 Ob 133/99v – Liability for misuse of ATM cards

NAME AND LEVEL OF COURT:
Oberste Gerichtshof (Supreme Court)

Liability; bank cards; ATM; misuse; electronic signature (PIN)

Source: ecolex 2000, 617 (Wilhelm) = ÖBA 2001/944, 250 (Koziol) = RdW 2000/576, 599 = RZ 2000, 253 = SZ 73/107

Excluding all liability under terms and conditions for technical misuse of ATM cards against bank clients is impermissible. What is effective, however, is a contractually agreed exclusion of liability for misuse in the case of loss of an ATM card.

The principles were recorded by Dr. Clemens Thiele, LL.M.

The Supreme Court, in the person of Supreme Court Divisional Chairman Dr. Niederreiter as Chairman and Supreme Court counsel Dr. Schinko, Dr. Tittel, Dr. Baumann and Hon. Prof. Dr. Danzl as additional judges in the matter of the plaintiff, V*****, represented by Dr. Heinz Kosesnik-Wehrle, attorney at law, Vienna, against the Defendant, E*****, represented by Wolf, Theiss & Partner, attorneys at law, Vienna, for ATS 60,000, with costs, following the defendant's appeal against the judgment of the Higher Regional Court, Vienna, as court of appeal of January 21, 1999, case ref. 1 R 195/98y-103, which, on appeal by the defendant, upheld the Vienna Commercial Court's judgment of July 08, 1998, case ref. 29 Cg 172/98h-98, sitting in camera:

The appeal is dismissed.

The defendant is liable to pay the plaintiff's costs in the appeal at ATS 4,872.30 (including ATS 813.10 VAT) as assessed within fourteen days.

Grounds for the judgment:

Alessandro T***** had had a giro account with the defendant from 01.06.1989. The defendant granted him an overdraft facility of ATS 3,000 on that account. He applied for a cheque card on 01.06.1989, and the defendant issued him one which was also a multifunction card. On 12.06.1990, one of the defendant's branches called Alessandro T***** by telephone, to inform him that his account was ATS 9,000.00 over its overdraft limit, because two amounts of ATS 5,000.00 had been taken out via ATM no. ***** at the Z****, M***** branch, on 08.06.1990 at 08.04 and 09.06.1990 at 07.41 respectively. The defendant blocked the multifunction card the same day (12.06.1990). Alessandro T***** disputed the defendant's allegations that ATS 5,000.00 had been withdrawn from the ATM on 08.06.1990 and 09.06.1990 in each case, indicating he had not made the withdrawals, and demanded that the defendant re-credit him with the sum of ATS 10,000.00, which the defendant refused to do. It alleged that because of the ATM withdrawals of ATS 10,000.00 on 08.06.1990 and 09.06.1990, the defendant debited Alessandro T*****'s account and subsequently netted that amount against payments made into the account. Withdrawing cash from ATMs involves a complex system of networks between the ATMs installed at banks, the IT system installed at G***** ('G*****') and the banks at which the accounts are held.

ATM cards have a magnetic strip containing the following information:

- Card number

- Account number

- Sort code

- Check number (16-digit, verified specifically to client)

- Random number (this changes if a withdrawal is made)

- Chain data

Chain data shows when a withdrawal was last made using a card, and how much more the card holder can withdraw that day after making that withdrawal until they reach their limit of ATS 5,000.00 a day. This six-digit number, which is saved in the central log of the G***** company's computer, is designed to tell whether an ATM withdrawal was made with the same ATM card as the previous withdrawal, or whether a counterfeit duplicate ('clone') was used. When an ATM card is inserted in the slot in the machine provided for that purpose, all the data that is saved on the magnetic strip is sent to the G***** company's central computer.

An ATM consists essentially of a printer and floppy disk. The printer prints a chronological printout of all cash withdrawals made from that ATM on paper, which is known as the 'local log'. Chain data is not recorded in the local log. While all the data from ATM cards is saved on the ATM's floppy disk, that disk is used cyclically, and is therefore overwritten in the course of subsequent withdrawals, so it holds data for the most recent withdrawals only.

To take out cash, as well as inserting the ATM card, the four-digit code (PIN number) belonging to that card must be entered. The PIN is not stored on the card. Every ATM has a sealed core with a chip which contains the key code. From the sixteen-digit customer verification (check number) on the magnetic strip, the decoding chip hidden in the ATM checks to see if the ATM card that has been inserted matches the PIN code the customer entered. If it does, the machine releases the cash release key.

In 1990, there were ATMs in use which were controlled online and those that were controlled offline.

ATMs operating offline are not connected to the G***** company's central computer continuously, but only via a dial-up line. In 1990, data was exchanged four times a day.

Online ATMs are constantly linked to the G***** company's central computer at all times in normal operation. If a withdrawal is made, the ATM and the G***** company's central computer immediately communicate via what is called a duplex system.

The data held on the G***** company's central computer is microfilmed.

On 05.06.1990, Alessandro T***** used his ATM card to withdraw ATS 200.00 from the online ATM no. ***** in H***** at 08.03.

On Friday, 08.06.1990, ATS 5,000.00 was withdrawn from offline ATM no. ***** in M*****, at what was then the Z***** branch there, at 08.04. On Saturday, 09.06.1990, ATS 5,000.00 was withdrawn from the same ATM, no. ***** in M*****at 07.41.

On Monday, 11.06.1990, at 22.20, using his ATM card, Alessandro T***** took out ATS 100.00 from online ATM no. ***** in H*****.

There is no way of telling whether the two withdrawals of ATS 5,000 made on 08.06.1990 and 09.06.1990 were made using Alessandro T*****'s ATM card or by an unknown third party with a counterfeit ('cloned') ATM card.

The local log printed out at ATM no. ***** in M***** shows the withdrawal of ATS 5,000 at 08.04 on 08.06.1990. The G***** company's central microfilm log also shows ATS 5,000.00 being withdrawn at 08.04 on 08.06.1990. The chain data for this withdrawal shows the withdrawal on 05.06.1990, which is not disputed.

The withdrawal on 09.06.1990 at ATM no. ***** in M***** cannot be read off from this ATM's local log, as the printer had run out of paper and the place where the withdrawal should have appeared had been overprinted several times. The G***** company's microfilmed central log shows the withdrawal of ATS 5,000.00 at 07.41 on 09.06.1990. The chain data for this withdrawal also shows the withdrawal on 08.06.1990.

In the case of the undisputed withdrawal of ATS 100.00 on 11.06.1990, the G***** company's microfilmed log shows the withdrawal of ATS 5,000.00 on 09.06.1990, but there is no way of telling whether that chain data was stored on the magnetic strip on Alessandro T*****'s ATM card when he took out ATS 100.00 from online ATM no. ***** in H***** with his ATM card on 11.06.1990.

In 1990, Alessandro T***** was living with his mother in *****. He was working as a trainee at the fashion house T***** in *****. He came into work on Friday 08.06.1990 at 08.28. He arrived at his place of work on Saturday 09.06.1990, at 08.20.

Section 33 of the general terms and conditions of business of Austrian credit companies (28.09.1979

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version) reads:

> "Section 33 (1) The credit company cannot be held liable for any losses on account of force majeure in this country or abroad, or because of problems with its business. The same applies should the credit company close or limit its business on certain days or for certain times for good reason, wholly or in part.
>
> (2) Because of the large number and variety of business transactions for all business connections with customers, but also because its facilities are also used by non-customers, the credit company must also exclude any liability for itself and its staff insofar as the law allows, subject to the terms and conditions of business."

The 'customer guidelines for using cash issuing machines as part of the ATM service' include the provisions below:

> "Care: The customer must keep the ATM card with all due care. The code must be kept secret. It must not be recorded on the ATM card or kept together with it. Never reveal your code to anyone, not even your credit company, even if you lose it.
>
> Cover: The customer must not use the ATM unless the account on which the ATM card was issued has sufficient funds in it.
>
> Debits: ATM withdrawals are debited to the account and shown on account statements. Withdrawals at weekends and on public holidays are booked as if they were made the next banking day.
>
> Problems: The credit companies cannot accept any liability in connection with problems with ATMs.
>
> Liability: All the consequences and detriments if an ATM card is lost, misused, counterfeited or forged are for the account holder's account. The credit company can only accept liability for proven fault and only insofar as this assisted in proportion to other causes to cause the losses; however, it cannot accept any liability for losses caused by third parties manipulating facilities enabling cash withdrawals or settling accounts for which the account holder is demonstrably not responsible."

The plaintiff has applied that the defendant be ordered to pay the sum of ATS 10,000.00, plus costs. Alessandro T***** says he assigned his claim for payment of ATS 10,000.00 plus interest to the plaintiff as an association in the context of § 29 KSchG under § 55 para. 4 JN. T***** says he did not make the withdrawals at issue himself, nor has anyone told him who the unauthorised third party was who is supposed to have made these cash withdrawals. He had the genuine ATM card in his possession at all times, and in particular, at the time the withdrawals were allegedly made.

He used this ATM card himself to take out ATS 100.00 from a cash machine on 11.06.1990. No-one else knew the PIN code that was needed for ATM withdrawals, except for his mother, who was jointly liable. At the time the withdrawals were allegedly made, T***** himself was on his way to work, where he says he arrived at 08.28 on 08.06.1990 and at 08.20 on 09.06.1990: so there was no way he could have made these withdrawals himself. Also, on 08.06.1990, at his employer's offices, T***** made out a settlement cheque drawn on his salary account, presenting his genuine ATM card: so there was no way any third party could have used the genuine card. The alleged withdrawal, or debit, must therefore be due to a system error, an incorrect booking or misuse by an unknown third party, using a forged ATM card and 'shoulder surfing' the PIN code. In none of these cases is T***** liable for the loss, he said. As a general rule, banks must not charge their customers for abusive withdrawals, banks absorb the losses. The "Guidelines for customers using cash machines via the ATM service", on the other hand, devolve the losses to the account holder, stating they bear all the consequences and detriments, even if [their card] is misused; the bank is only liable if it can be shown to be at fault, and then only insofar in proportion as this combined with other causes to cause the loss. He said reversing the burden of proof could not be invoked against consumers, under § 6 para. 1 Z 11 KSchG. The "General terms and conditions of business of Austrian financial institutions", section 33 para. 2, excludes all liability on the part of the banks 'insofar as the law allows'. This means that, ultimately, their liability is limited to gross negligence. Both sets of terms and conditions cited contained detrimental provisions for the purposes of §

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864a ABGB. Such liability and devolution provisions might not appear to be a problem, he argued, in cases where customers enabled their ATM cards to be used without authorisation by being careless or losing their cards accidentally; but if someone copied an ATM card without any fault on the customer's part and 'shoulder surfed' the code they entered in good time, which was clearly possible, technically speaking, this was down to the risks which were inherent in complex equipment and technology. For this reason alone, this should not be held against the customer, but against the bank, because it was the latter that introduced ATM machines and used them to attract more business.

Nonetheless, both sets of general terms and conditions meant that, as a general rule, the losses remained with the customer, because the requirement that the bank had to be at fault – which it was up to the customer to prove – was not met, and the customer had to bear the loss even though it had occurred at the bank.

This exclusion of liability was, he argued, contrary to § 879 para. 3 ABGB. Although it was the bank which was injured in the first instance, and which was financially stronger, it devolved the losses onto the customer, arguing factors were lacking (significant contributory cause, fault) which were not present on the customer's part either. On the other hand, using ATMs benefited the bank considerably (gaining customers quickly, saving on staff costs, levying additional charges for ATM cards, etc.). It was the bank which made the ATM service possible, and hence created the risk. And the bank was also emphasising constantly how safe taking money out of cash machines was, and was using this as propaganda. Customers were obliged to rely on the bank's assurance that this system was safe, and nothing was said to them about potential risks or sources of faults in the ATM system that could arise without any fault on the customer's part. All this together amounted to a considerable detriment to the customer under § 879 para. 3 ABGB, so the bank's exclusion of liability was (it was argued) null and void.

The defendant applied that the action be dismissed. The two cash withdrawals at issue had been made using the multifunction card issued on T*****'s giro account, it argued, which he had also used to make other undisputed cash withdrawals. The technical design of the cash machines and ATMs, which were designed entirely by the G***** company, and the memory data stored on ATM cards' magnetic strips meant there was no way the ATM withdrawals at issue could have been made other than by inserting the original ATM card in the ATMs and entering the associated PIN code.

Following the two withdrawals at issue, it said T***** took out ATS 100.00 using the original ATM card the defendant had issued him with at ATM no. ***** at 22.20 on 11.06.1990. Analysing G*****'s data processing system's checks on the ATM card which was inserted at that time for the continuity of the data on it showed, it said that, prior to that withdrawal, the same original ATM card had been used to withdraw the money at 07.41 on 09.06.1990. That cash withdrawal was (it said) saved on the original card T***** had used.

Once the withdrawal process that had been set in motion with the original ATM card was duly completed, it argued, the cash machines dispensed the amounts, and they were actually taken as well. If the banknotes offered had not been taken from the machine's cash slot, they would have been taken back in again, in which case, T*****'s giro account would not have been debited. If they had been taken back in, that would also have shown up on the cash machine's log strip; this was not the case, however. The data saved on the occasion of the cash withdrawals at issue had been forwarded to the defendant correctly, it said, which debited T*****'s giro account in line with that data: there were no booking errors.

The liability provisions the plaintiff disputes were not unethical either under § 879 para. 3 ABGB, even assuming the withdrawals were made using a cloned ATM card. Excluding liability on the part of the bank with whom the account was held, which was not at fault here, in the event of counterfeit (copied) ATM cards being misused, did not constitute terms of contract that were grossly detrimental to the bank's customers. These provisions reflected the distribution of risk which was inherent in the ATM contract. Even if these liability provisions were not included in the contract, one would still have to conclude, using the domain theory, that the detriment had to be borne by the party in whose domain it arose. If one accepted the plaintiff's line of argument, manipulation of the card, which the customer held, and which was therefore within its domain, could be used to withdraw money: so it was the customer who had to bear the detriment in any case. This conclusion also stood up, it said, because using the ATM card was primarily in the customer's interest. It was 'purely as an

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extreme precaution' that the defendant also invoked the 'waiver clause' under section 33 AGBÖKr.

The *court of first instance* found for the plaintiff, and ordered the defendant to pay the plaintiff ATS 10,000.00 plus 4 per cent interest from 20. 7.1990. Its findings were essentially the same as those mentioned at the outset. In matters of law, the court of first instance found, in the event that both withdrawals had been made with the original ATM card, that debiting T*****'s account and subsequently netting them against credits to the account was done correctly, and the plaintiff had no action in law. If both withdrawals were made by an unknown third party, using a cloned ATM card, the "Guidelines for customers using cash machines as part of the ATM service" included a provision that was material to the case at issue here: "All benefits and detriments from faking ATM cards will be borne by the account holder," which the plaintiff disputes as contrary to § 864a ABGB. The first question to consider was who had to bear the detriment if a counterfeit ATM card were used, in the absence of an appropriate provision in the defendant's general terms and conditions. In that case, one would have to agree with the plaintiff that, in that case, it was the bank's assets that were injured.

Through using a counterfeit ATM card, the unknown third party had caused banknotes to be issued which counted as the bank's assets. If the holder of the account which the bank then debited was not at fault in respect of those cash withdrawals – no fault on T*****'s part had been shown in the present case –, it would be wrong for the bank to devolve the losses it suffered onto its customer by debiting his account, as the customer was not under any obligation to indemnify the bank for its losses as he was not at fault. As the ATM cards the bank issued were not counterfeit-proof, it could not be said, either, that the fact that the ATM card had been counterfeited was (exclusively) within the customer's domain, if he could not be accused of any lack of care in dealing with that ATM card. Under statutory compensation rules, if an unknown third party used a cloned ATM card to make the withdrawal at issue here, there was no basis in law on which the defendant who was injured could devolve its losses onto T*****, as it could not be shown that T***** had been careless with his ATM card. The clause in the defendant's general terms and conditions, whereby 'the account holder bears all the consequences and detriments of counterfeiting the ATM card' would, in general, be considered a provision which was substantively unusual for the purposes of § 864a ABGB, which was not required to be foreseen in reasonable dealings with banks, and which was grossly detrimental to the banks' customers, because they meant customers would be liable to indemnify their banks for losses even if those customers were not at fault. It was not alleged during the proceedings that the defendant had drawn T*****'s attention to these clauses of its general terms and conditions when concluding contracts: so, under § 864a ABGB, those provisions did not form part of the contract concluded between T***** and the defendant. T***** was not liable, therefore, if an unknown third party had made the withdrawal at issue using a counterfeit ATM card – which was not established.

As it was not established either whether the two withdrawals were made using the original ATM card and with T*****'s knowledge, one then had to consider whether the action should not be dismissed, solely because the plaintiff had not shown this was not the case.

In principle, it was up to each party to prove the facts on which their applications are based. On the other hand, there was another rule of evidence, which said, '*negativa non sunt probanda*'. Here, it must be assumed that it was up to the defendant to furnish positive proof that the two withdrawals were made with the original ATM card, not for the plaintiff to prove a negative, i.e. that they were not, and hence that no disbursement was made to T*****, or to a third party with his knowledge, because, in providing its facilities, ATM and ATM cards and the technical facilities they required, the defendant was 'closer to the evidence'.

As it was not shown that the withdrawals were made with T****'s original card with his knowledge or that T**** was negligent with his ATM card and thus enabled an unknown third party to make the withdrawals using a counterfeit ATM card, there was no basis as the facts stood, either in statute or effectively in contract, for the defendant to devolve the losses onto T***** , so the court therefore had to find in the plaintiff's favour.

The *court of appeal* dismissed the defendant's appeal, and found that the value at issue was more than ATS 52,000.00, but not more than ATS 260,000.00, and that an appeal in ordinary was therefore admissible.

Provisions of unusual substance in general terms and conditions or in contracts forms which are used by a contractual party do not become part of the contract,

under § 864a ABGB, if they are detrimental to the other party and that [other party] was not bound to have foreseen them, from the external appearance of the deed in particular, unless one party to the contract drew the other contracting party's notice to it.

If a provision of a contract breaches this rule, the contract is binding without it. A clause would be considered as objectively unusual if it departed clearly from the other contracting party's expectations so that [other party] could not reasonably have been expected to foresee it: such terms of contract would therefore have to take parties by surprise or even dupe them. It is not just a matter of their substance, however: whether a provision is unusual depends, rather, on how it fits in with the wording as a whole.

Applying the position in law as set out above to the present case, there cannot be any suggestion that the offending provision of contract was 'concealed' in the defendant's customer guidelines in such a way that the other contracting party might not suspect it was there. The section in question was headed, unmistakeably, 'Liability'. It was undoubtedly that section where the other contracting party to the party using the general terms and conditions would be bound to expect the offending clause. Even bearing in mind that Alessandro T***** and/or his mother did not have their attention expressly drawn to this provision when concluding contracts, there is usually a relationship of trust between banks and their customers, and, given that the banks were advertising massively in favour of using ATM cards then – as they are today -, there could be no question of any such substantively unusual clause, if only because ATMs in Austria were not counterfeit-proof. As it could not therefore be said that there was a breach of § 864a ABGB in this case, the offending clause in the defendant's customer guidelines was also agreed and binding. The substantive review which was now required under § 879 para. 3 ABGB, on the other hand, went against the defendants: for, if the validity review (§ 864a ABGB) did not result in the term of the contract disputed being excluded, the question then arose, as the plaintiff argues here, as to whether what became the substance of the contract, the provision in the terms and conditions or contract form was grossly detrimental to the other contracting party. The general clause enshrined in § 879 para. 3 ABGB is designed to exclude unfair provisions in terms and conditions or contract forms: the ancillary provisions they contain are, not infrequently, where the objective unreasonableness of the provisions is to be found, as the party using the general terms and conditions or forms uses them to unilaterally shift the balance of interests the law requires to the other contracting party's detriment and 'dilutes their free will', making these elements of contract part of their declaration which they did not, in reality, intend. This shift is all the more unreasonable, the more it undermines the other contracting party's free will. If departing from non-mandatory law in itself could be grossly detrimental to the other contracting party, if it lacked any kind of substantive justification in law, such detriment must always be assumed, if the position one contracting party obtains in law is strikingly out of proportion to the other's. Weighing the interests up shows whether the clause can (still) be considered as an objectively justified departure from the yielding law; above all, when weighing these interests, the importance of the interests attributable to the party using them in doing so must be set against the burdens it might impose on the other contracting party.

All this applied to the circumstances in this case, in which, under the customer guidelines, the defendant's position in law was strikingly disproportional to the customer's, and in fact grossly detrimental to it. It was the fact that, as the financially stronger party, the banks had introduced the ATM system in Austria with a great deal of advertising but, unlike in Germany, had not designed their ATMs to be counterfeit-proof. While the ATM system benefited both parties, it would undoubtedly be the bank, which charged fees for issuing ATM cards and was saving on staff costs, whereas its customers had to accept the ATM system as it was offered, and more particularly, including the risk of their ATM cards being cloned through no fault of their own, which benefited more.

Finally, the Federal Supreme Court had already considered these problems and ruled that a clause which devolved the risk of misuse onto the customer whether they were at fault or not was invalid. All these considerations made the offending liability provision in the defendant's customer guidelines grossly detrimental to the customer, so the substance check under § 879 para. 3 ABGB resulted in the provision of the contract in question on the customer being liable for all effects and detriments resulting from the ATM card being counterfeited or cloned was null and void.

In the light of these arguments, the plaintiff's action

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thus appeared justified. For the avoidance of doubt alone, it should be mentioned here that the court of first instance's findings on the burden of proof were also upheld. The court of first instance found, correctly, that in this case, where it had not been established that Alessandro T***** had not made the withdrawals at issue himself or in conspiracy with a third party, the defendant was 'closer to the evidence' in terms of the ATM system it provided and that the burden of proof to show that the ATM withdrawals had been made, by misuse by a third party, by system error or by being tampered with, rested on it.

This appeared entirely proper, given also that, under the circumstances as shown, there was no way the customer could have provided the evidence on this point.

The *appeal in ordinary* was *admissible*, because the Supreme Court had not yet decided in a comparable case. The appeal the defendant lodged, on the other hand, was *unfounded*.

The appeal argued essentially that, in the present case, the exclusion of liability agreed was not null and void under § 879 para. 3 ABGB. Rather, in the case of improper use of a forged (copied) ATM card, the exclusion of liability agreed in the bank's favour – which was operating the account without fault - reflected the distribution of liability inherent in the ATM contract. The ATM contract (it claimed) mainly benefited the customer by making it easier for them to take money out without being charged fees for individual withdrawals.

In view of these benefits, there was no way it could be regarded as grossly detrimental that customers should also have to bear the risks involved in using ATM cards. However, nor was this in breach of § 879 para. 3 ABGB as there were also comparable provisions on bearing risk in §§ 1155 and 1168 ABGB. Here, too, risk was allocated by domain.

On assigning the burden of proof, the appellant argued that the circumstances as established indicated, in the light of general experience, that the withdrawals at issue had been made with the original card, using the PIN code. Seen in the light of typical experience, this was *prima facie* evidence, contrary to how the court of appeal saw it, that the original card had been used. To counter this *prima facie* evidence, it was up to the cardholder to show and prove that, in this specific case, there were particular circumstances (such as the ATM card being cloned, for example) to indicate that things had actually happened otherwise.

These arguments do not stand up, in the final resort:

Under § 879 para. 3 ABGB, provisions of contract contained in general terms and conditions of business or contract forms which do not define one of the main performances of both parties are null and void in any case if they are grossly detrimental to one party in the light of the circumstances of the case as a whole. They may be taken as grossly detrimental in any case if the position in which one party is placed in law is disproportionate to the comparable position in law of the other (EvBl 1983/129 = JBl 1983, 534).

As the court of appeal itself stated correctly, this is the case with the customer guidelines here.

On the other hand, a distinction must be made between excluding the banks' liability for misusing ATM cards technically and excluding liability for misuse due to loss. There could be no objections to the liability provisions in the general terms and conditions if card and code were lost. It is a different matter, however, if, through no fault on the customer's part, an ATM card is copied at a 'counterfeit' ATM till, and at the same time, the code is copied by 'shoulder surfing' as it is entered. These cases manifest the risks involved in using complex equipment and technology. All these are factors which, even on a *prima facie* basis, must be attributed not to the customer but to the bank, because it was the latter which brought these into use and uses them to increase its business. The way the customer guidelines attribute risk cannot stand up when examined under § 879 para. 3 ABGB. On the contrary, it must be seen as grossly detrimental if the bank, which suffered the loss in the first instance and which is certainly the stronger, financially speaking, devolves those losses onto the customer, invoking the absence of factors which are also absent on the customer's part: because they did not make the significant causal contribution either, nor are they at fault. It appears, in fact, that the only reason [the bank] could devolve these losses was its position of power as the stronger of the contracting parties (Kurschel, "Duplicated" and lost ATM cards, ecolex 1990, 79).

Nor can the domain theory which the appellant advances or comparison with §§ 1155 and 1168 ABGB lead one to conclude otherwise. The point here is, precisely, that the contractual provision at issue does not assign risks on the basis of whose domain it was in which the loss arose: instead, it excludes the bank's

liability completely, wholly irrespective of which contracting party that misuse could be attributable to. Moreover, it is precisely the case in which an ATM card is duplicated which is not attributable to the customer's domain, but rather to the bank's area of risk, as such counterfeits are made presumably by manipulating an ATM and/or fitting cameras, and it is therefore within the bank's domain of influence to prevent such misuse.

Excluding banks' liability for technical misuse of ATM cards, unlike excluding liability for misuse due to loss, is therefore null and void under § 879 para. 3 ABGB.

Another question to consider is on whom the burden of proof rests to show that a duplicated card was used, and not the original ATM card.

In principle, the burden of proof when using a PIN card remains where it usually does: if the card issuer demands its costs be indemnified, it is up to it to show that it was the cardholder themselves who used the card. It is therefore up to it to show that it was the cardholder's card in question that was used, and not, say, another, counterfeited card or even a complete counterfeit. Using the PIN, on the other hand, indicates quite strongly that the cardholder used the card themselves, or at least enabled it to be misused through fault on their part (cf. Taupitz, [Questions of liability in civil law in cases of card misuse under Austrian law], ÖBA 1997, 765 ff [780]).

If the correct PIN was used, therefore, this is *prima facie* evidence that the cardholder used the card themselves, or that confidentiality obligations had been breached (Taupitz op. cit.). On the other hand, the cardholder can refute the *prima facie* evidence by proving that the sequence of events which occurred was very probably atypical (Rechberger in Rechberger, ZPO2 note 22 to § 266). In that case, the party on whom the burden of proof originally rested must provide strict evidence of the (principal) facts it alleges.

In the present case, the previous courts found the *prima facie* evidence was refuted by the finding that it had not been shown that the withdrawals at issue were made with the original ATM card, and hence that it had not been brought. This is apparent from the specific circumstances of the individual case (the withdrawals were made at a time when the cardholder could not have been present where they were made, the card could have been duplicated, the PIN could have been 'shoulder surfed'). Unlike the question of whether prima facie evidence is admissible, however, this is not a question of law, but of fact, which is not open to appeal (Rechberger op. cit.). As it follows that the defendant has failed to produce the proof, which rests on it in principle to show, that it was the cardholder who used the original ATM card, either via *prima facie* evidence or otherwise (strict proof), it was wrong to debit the ARM card holder's account, so the action is upheld.

The award as to costs is based on §§ 41, 50 ZPO.

Notes

I. The issue

The plaintiff applied that the defendant be ordered to pay the sum of ATS 10,000.00 plus costs for debiting his account improperly following repeated ATM card misuse.

Alessandro T***** had assigned his claim for payment of ATS 10,000.00 plus interest to the consumers' association which brought the action. The original ATM card was in Herr T*****'s possession at all times, and, more particularly, at the time of the alleged withdrawals. It could not be established whether the two withdrawals of ATS 5,000.00 each, on 08.06.1990 and 09.06.1990, were made using the original ATM card or by an unknown third party using a counterfeited (cloned) ATM card.

Ultimately, the question the courts had to answer was whether the bank was entitled to demand that the customer indemnify it for its costs incurred as a result of the ATM card being misused (= the amounts withdrawn), or whether it had to credit the customer for the money 'swiped' from their account as a result of an ATM card being misused?

II. The Court's decision

The Supreme Court's answer to the question as to the liability risk if ATM cards are misused was highly differentiated: excluding the bank's liability in its general terms and conditions of business if card and code are lost would be binding; excluding liability for technical misuse, on the other hand, would not be.

Ultimately, the Supreme Court upheld the lower courts' view of the law, and found that, in civil law, it was the banks which had to bear the risk of ATM cards being misused, so they could not debit payments made without authorisation to customers' accounts. On the allocation of burden of proof, the Supreme Court found that using the correct PIN at the first attempt indicated quite strongly that it was the cardholder who had used

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the ATM card themselves, or who at least had enabled the misuse through negligence on their part (by close relatives, for example). The facts of the case as actually established did not, however, show that the withdrawals at issue were made with the original card, which, in the Supreme Court's eyes, meant that the *prima facie* evidence that would otherwise be held against the customer was refuted or had to be considered as not furnished.

III. Discussion and looking ahead

The first argument in favour of the Supreme Court's opinion is the 'nature of the ATM business'. Taking cash out and cashless ATM payments are dispositions over the credit balances customers have with their banks or using their credit limits. Both are, in principle, only binding if it is the beneficiary who undertakes them. In that respect, ATMs are merely payment offices of the bank with which the account is held. It follows that no-one can either dispose of customers' credit balances with banks or take up credit at the account holder's expense without authority.

It is not as if banks provide their customers with ATM cards out of altruism, either. Rather, if we are to believe the research on this subject, they save them considerable staff numbers and hence costs. The customer benefits from being able to take money out any time, day and night; the enormous financial benefits of automation, on the other hand, to the bank operating the account.

The Supreme Court must be supported in its view that a clause is binding insofar as it concerns the risk of losing cards and codes, as this risk is within the cardholder's control. They are more in a position to control the risk of [cards] being lost or misused (cf. on similar considerations on bearing risks in credit cards, OGH 28.8.1991, 3 Ob 530/91, ecolex 1991, 845 = EvBl 1991/196 = ÖBA 1992, 297 [*Fitz*] = SZ 64/110; 30.5.1979, 1 Ob 598/79, SZ 52/89).

As the Supreme Court sees it, the risk of technical misuse in using ATM cards rests with the bank. Any clause which devolves that risk to the customer is grossly detrimental. The case the Supreme Court had to consider here, was whether the card might have been copied and the code 'shoulder surfed' at the same time. In that respect, the Court's distinction between domains of risk appears thoroughly appropriate.

Looking ahead, this decision leaves the question open as to whether, and if so, what duties of care may be imposed on bank customers by way of general terms and conditions, that is, imposed bindingly by the banks, and if so, what these duties of care should be.

IV. Conclusions

Since a precedent is deemed to have been established, it can be presumed that when ATM cards are misused, a distinction must be made to the effect that banks cannot exclude liability for technical misuse of ATM cards (without fault) under § 879 para. 3 ABGB, whereas they can exclude liability for misuse due to ATM cards being lost.

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