CASE NOTE:
RUSSIAN FEDERATION

CASE CITATION:
Resolution of the Federal Arbitration Court of Moscow Region of 5 November 2003 N KT-A 40/8531-03-II

NAME AND LEVEL OF COURT:
Federal Arbitration Court for the Moscow Region

PLAINTIFF:
Open Joint Stock Company of Intertoll and International Electric Communication 'Rostelecom'

DEFENDANT:
Joint Stock Commercial Savings Bank of the Russian Federation

Facts

The parties had concluded a bank account agreement with a supplement to the agreement regulating the use of the 'Client-Savings Bank' system to perform banking transactions by means of electronic documents. On 2 August 1999, 29,580,850 roubles were debited from the client's account by electronic payment order. The client affirmed that he had never instructed the bank to debit the amount of 29,580,850 roubles by the electronic payment order. Criminal proceedings were subsequently initiated. The client initiated legal proceedings against the bank before the Arbitration Court for the City of Moscow. The plaintiff sought damages caused by an unauthorized debit in the amount of 29,580,850 rubles.

Procedural history

First instance, the Arbitration Court for the City of Moscow 22 November 2000 (N KT-A40/1166-01); second instance, the Appellate Division of the Arbitration Court for the City of Moscow 22 January 2001; third instance, Federal Arbitration Court for the Moscow Region 22 March 2001 (reversing and remanding (the lower courts had wrongfully declined a motion to call for an expert opinion performed within the criminal proceeding filed by the plaintiff)); first instance, Arbitration Court for the City of Moscow (NKT-A 40/8531-03-II) 11 March 2003; second instance, Appellate Division of the Arbitration Court for the City of Moscow 28 July 2003; third instance, Federal Arbitration Court for the Moscow Region 5 November 2003.

Grounds of appeal

In the cassational motion, the plaintiff requested the reversal of the judgments of the lower courts and to satisfy the claim due to the following reasons:

1. The incorrect application of Article 22 of Federal Law of 20 February 1995 N 24-FZ 'On Information, Informatization and the Protection of Information' which establishes the liability of the owner of an information system;
2. The expert opinion accepted by the courts as a basis for the decision in the matter did not satisfy the requirements provided by Articles 68 and 86 of the Arbitration Proceedings Code of the RF;
3. Paragraph 2 of the Resolution of the Plenum of the Supreme Arbitration Court No. 5 of 19 April 1999 'On Certain Issues of Considering Disputes Relating to the Conclusion, Performing and Termination of the Bank Account Agreements', providing bank liability for the consequences of execution of orders given by unauthorized persons should be applied in the present case;
4. The findings of the courts set out in the judgments did not correspond to the facts of the case.

Discussion by the court

Dismissing the cassational motion filed by the plaintiff, the Federal Arbitration Court made the following observations:

The plaintiff failed to prove the breach of the bank account agreement and supplement to the agreement regulating use of the 'Client-Savings Bank' system by the defendant. The conclusions of the lower courts are based on the comprehensive and full examination of evidence duly assessed from the perspective of relevance, admissibility and credibility; the findings of the lower courts correspond to the facts of the case and the evidence in case.

On remand, the court satisfied the motion of the plaintiff to perform an additional (technical) expert examination, and both parties proposed the issues to be examined. The additional (technical) expert report was justified by the fact that during the examination performed within the criminal proceedings, a number of issues had not been examined, therefore the expert

opinion did not provide for the conclusions in respect of arguable circumstances.

Assessing the expert opinion of the technical commission report of 2 October 2002, the lower courts reasonably concluded that the evidence testified to the fact that there were signs of the electronic payment order transfer, and the electronic digital signature affixed to the disputed payment order was correct and belonged to the vice general director of the plaintiff. The examination also indicated that the system in place did not permit the communication session to begin without producing the client's main key, or to send documents from the client's computer on behalf of the other client, or to process documents that were not signed with a duly registered electronic digital signature.

The courts reasonably observed that the plaintiff had not produced any evidence of loss or other removal from the possession of a person entitled to use the electronic digital signature of the diskette containing the electronic digital signature affixed to the disputed payment order; the plaintiff had not revoked the disputed payment order; the software of the 'Client-Savings Bank' system was protected from unlawful access.

It is also very important that both the examination held within the criminal proceedings and the examination held within the case at hand, did not indicate that the information system was working unusually, or there was unlawful access to the system.

Considering all these facts established by the courts, the arguments of the cassational motion are invalid.

The argument of the plaintiff that paragraph 2 of the Resolution of the Plenum of the Supreme Arbitration Court No. 5 of 19 April 1999 'On Certain Issues of Considering Disputes Relating to the Conclusion, Performing and Termination of the Bank Account Agreements' (providing bank liability for the consequences of execution of orders given by unauthorized persons), should be applied, is not valid in the present case, because the disputed payment order was signed by the correct electronic digital signature belonging to an authorized person.

Decision by the court

Considering above the cassational court upheld Decision No. KT-A 40/8531-03-II of the Arbitration Court for the City of Moscow and the Resolution of the Appellate Division of the Arbitration Court for the City of Moscow 28 July 2003, the cassational motion of the plaintiff was dismissed.

Commentary

This case was considered before the Federal Law dated 10 January 2002 N 1-FZ 'On Electronic Digital Signature' (the Law) came into force. However, the present case is one of the first examples when the court recognized an electronic digital signature to be legally valid.

As the facts of the case demonstrate, the problem of keeping the private key of an electronic digital signature in secret is still urgent. The rules of the Law provide that the liability for information disclosure is on the owner of a signature key certificate, and the Law does not protect the owner from unlawful use of his signature key. It can lead to unfortunate results, especially in banking, where the use of the electronic digital signature is widespread. For several years, the amount of litigation relating to the recovery of damages caused by unauthorized debiting of an account has greatly increased, and the results of these proceedings are usually not in favour of the owners of the private key. One of the last cases relating to this problem was considered by the Federal Arbitration Court for the Moscow Region in 2007 (The Resolution of the Federal Arbitration Court for the Moscow Region N KT-A40/10952-07 of 29 October 2007). The facts were similar to the present one: the client's funds in total amount of 62,989,427.44 rubles were debited from the client's account by several electronic payment orders signed with the electronic digital signature of an authorized person. The debit was completed in the 'Bank-Client' regime in accordance with the agreement concluded between the bank and the client. Dismissing the claim filed by the client, the court referred to Articles 4 and 12 of the Law, stating that it is for the key certificate owner to keep the private signature key secret, and he is entitled to suspend the signature key certificate if there are reasons to believe that the secret electronic digital signature key has been disclosed. If the provisions of the present article fail to be observed, the owner of signature key certificate is liable for damages relating to losses inflicted as the result.

It is obvious that the measures provided by the Law do not guarantee the security of the private key. This is the reason why the problem is widely debated among the specialists. Whether the private key of a electronic digital signature has been lost and subsequently misused, or used without the authority of the owner, will be a difficult matter in any subsequent dispute, as indicated by K. B. Leontyev, who considers that the particular circumstances of the facts and subjective factors will be prominent: 'For example, the private key

may be stolen even if all reasonable security measures were undertaken, and it is difficult to notice the "theft" of a private key at once. Thus, the provisions of the article (Article 12 of the Federal Law On electronic Digital Signature) give grounds to expect the appearance of a rather contradictory policy of the court. In many cases, courts' judgments will be based, first of all, on confessions and explanations of the electronic signature owner himself'.[1]

The case set out above demonstrates all the difficulties the key owner faces when his signature key has been disclosed. In fact, there are no means of proof the plaintiff could use in such cases. It is important that the court referred to the results of the examination that concluded there was no unlawful access to the system. It means that if the reason why disputed payment orders were transferred to the bank was related to deficiencies in the 'Bank-Client' system, and the results of the examination confirmed this fact, the court would satisfy the claim brought by the client.

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[1] *K. Leontyev Commentary on the Federal Law 'On Electronic Digital Signature' (Moscow, 2003) 17; see also Stephen Mason, Electronic Signatures in Law (Tottel, 2nd edn, 2007), 11.9 – 11.30; 15.37 – 15.43.*