

Information Technology - Switzerland

Non-delivery following eBay sale is not fraud *per se*

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The Federal Supreme Court has overruled the judgment of an upper cantonal court finding a seller guilty of fraud after he sold several products that he did not possess, and subsequently did not deliver, through online auction platforms eBay.ch and ricardo.ch. The Supreme Court held that the cantonal court had not sufficiently established that the seller had misled his customers about his intention and ability to fulfil their orders. Therefore, the Supreme Court partially approved the seller's appeal and instructed the cantonal court to conduct a more thorough assessment of the facts.

Facts

The seller had repeatedly offered mobile phones, games consoles and garden furniture in auctions on eBay.ch and ricardo.ch since 2007. His customers had to pay for the purchased products in advance. The seller did not possess the products, and in most cases was unable to deliver them subsequently. He systematically changed his nickname, name, phone number and email address, and opened several online accounts. Customers were often put off with emails stating that delivery would take place soon. In some cases, if customers persisted regarding delivery or threatened the seller with or actually filed a criminal complaint, he fulfilled his obligations.

The seller had also concluded 10 contracts with two mobile telecommunications providers regarding two-year fixed contracts for mobile phone services, and had received 10 mobile phones in return. He had resold these mobile phones without fulfilling the payment obligations arising out of the contracts or transferring them to the purchasers of the phones.

Cantonal courts' judgments

According to the lower and upper instances of the cantonal courts, the seller was aware that he would be unable to deliver the products that he sold online in due time, or at least thought it was possible that he would be unable to deliver in due time, and he accepted this. The cantonal courts found that the seller had wilfully induced an erroneous belief in his customers by falsely claiming that he could deliver in due time. With regard to the 10 mobile phone contracts, the cantonal courts held that it was evident that the seller had been unwilling to fulfil his obligations from the start. Therefore, both cantonal courts found the seller guilty of fraud for commercial gain.

Legal requirements of fraud

Article 146 of the Criminal Code states as follows:

"1. Any person who, with a view to securing an unlawful gain for himself or another, wilfully induces an erroneous belief in another person by false pretences or concealment of the truth, or wilfully reinforces an erroneous belief, and thus causes that person to act to the prejudice of his or another's financial interests, shall be liable to a custodial sentence not exceeding five years or to a monetary penalty.

2. If the offender acts for commercial gain, he shall be liable to a custodial sentence not exceeding ten years or to a monetary penalty of not less than 90 daily penalty units."

Supreme Court's judgment

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The Supreme Court held that not every late delivery constitutes a financial prejudice. According to the court, this holds true even if the late delivery was certain from the outset or was regarded as being possible and accepted. The court pointed to the Code of Obligations setting forth the available remedies in case of non-performance. Article 107 of the code provides that where the obligor under a bilateral contract is in default, the obligee is entitled to set an appropriate time limit for subsequent performance. If performance has not been rendered by the end of that time, the obligee may:

- compel specific performance in addition to suing for damages caused by the delay; or
- forgo specific performance and either claim damages for non-performance or withdraw from the contract altogether.

As a rule, a seller remains at liberty to obtain the products sold even after receipt of an advance payment. If procurement of such products fails, the purchaser withdraws from the contract and the seller refunds such advance payment, no fraud has been committed. Accordingly, when a seller is not unwilling to fulfil the contract from the outset but performs only after being in default (or refunds after the purchaser's withdrawal), no financial prejudice or intention to secure an unlawful gain exists. The court stated that the non-performance of obligations should not be generally criminalised (even if such non-performance is considered to be possible and accepted in advance). According to the court, the excessive penalisation of economic transactions is inappropriate and should be avoided, since non-performance often cannot be excluded with certainty.

The court held that the situation would be different if a seller lacked the intention to fulfil at the time of concluding the contract, and instead intended to keep the advance payment for himself. In such case, there would be financial prejudice and a view to securing an unlawful gain. As a rule, the intention to fulfil is not verifiable for a contractual partner; therefore, if such intention does not exist, it constitutes a wilfully induced erroneous belief by false pretences. Further, a wilfully induced erroneous belief by false pretences will exist if a customer is induced to make an advance payment by a seller who claims to possess a certain product, but does not.

However, according to the court, the law enforcement authorities must provide evidence of the existence of such prerequisites. The court held that the upper cantonal court had erroneously left open whether the seller lacked an intention to fulfil and had instead pretended he was able to deliver. In the view of the Supreme Court, the cantonal court had not provided evidence as to whether the seller had caused financial prejudice to his customers and had regarded such prejudice as being possible and accepted it in advance. Instead, the cantonal court had simply argued that late delivery constituted a wilfully induced erroneous belief by false pretences and financial prejudice. Therefore, in this regard the Supreme Court approved the seller's appeal and instructed the cantonal court to conduct a more thorough assessment of the facts.

The court noted *obiter dictum* that in case a seller makes false pretences in the absence of financial prejudice and a view to securing an unlawful gain, a conviction under Article 3(b) of the Federal Law on Unfair Competition might be considered. Such clause provides that incorrect or misleading statements with respect to undertakings, goods or services by way of example shall be deemed to constitute an act of unfair competition.

Referring to the purchase and resale of 10 mobile phones, the court found that the assessment of the facts by the cantonal court was not arbitrary and therefore upheld the cantonal court's decision in that regard.

Comment

The Supreme Court's judgment has been criticised for sending the wrong signal to sellers on online auction sites. Sellers with dishonest intentions might interpret the Supreme Court's judgment as indicating that they need not fear the intervention of law enforcement authorities, since it will be difficult to provide evidence of their initial lack of an intention to fulfil.

However, some differentiations must be made. While the threshold for fraud is very high under Swiss law, this principle was not newly introduced by the Supreme Court's recent judgment.

In the case at hand the cantonal court's judgment (based simply on late delivery) appeared to contain no proper reasoning for the alleged financial prejudice, the view to securing an unlawful gain and a wilfully induced erroneous belief by false pretences. The Supreme Court found that not every late delivery constitutes a financial prejudice, and that the seller's missing intention to fulfil and his inability to procure cannot simply be assumed. Further, the Supreme Court has not excluded the possibility of a conviction for fraud in case of a seller selling against receipt of advance payment without being in possession of the products sold and being unable to procure them. Therefore, it appears that the Supreme Court did not materially disagree with the

cantonal court, but rather was troubled by its reasoning.

Arguably, there was sufficient evidence in the file to arrive at the legal conclusion that the seller wilfully induced an erroneous belief in his customers by falsely pretending an intention to fulfil, including the following:

- The fact that several actions were examined suggests that the seller acted systematically;
- The fact that the seller repeatedly changed his nickname, name, phone number and email address and used several accounts indicates that he intentionally tried to hinder his accessibility; and
- The fact that the seller put his customers off for as long as possible and fulfilled the contract only when the situation risked escalating implies that he never had a true intention to fulfil.

Moreover, according to Section 5.1 of the general terms and conditions of ricardo.ch, a pre-condition for the use of the auction platform is that a seller is able to dispose of the products offered. Similarly, the general terms and conditions of eBay.ch set forth that every seller shall be in a position to transfer the right of property immediately after the conclusion of a contract. Therefore, although it seems possible to procure the products sold only after sale, the fact that a seller does not organise procurement immediately after the conclusion of the contract contradicts the rules of the relevant marketplace and indicates that he never intended to fulfil.

The Supreme Court's judgment is understandable from a formal point of view since the court, as a rule, bases its judgments on the facts established by the lower courts. However, from a substantive perspective, it appears that it should still be possible to find the seller guilty of fraud.

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