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Wer herausgibt was wem woraus?

A few thoughts on the case 4A_88/2019 and the Agency without Authority.

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Receivables and debts are assets and liabilities, regardless of whether they are likely to ever be recovered or paid. Thus, the agent's obligation to return over-invoiced services to third party clients prevents the principal's action for the repayment of the profit on these invoices – whether or not the clients take any steps to claim the restitution of the overpaid amounts.

Summary

[1] SA (supplier) and C. SA (distributor) entered into a distribution contract for cards, coupled with a subscription, which made it possible to decrypt the signal of television channels. The cards were intended to be used only in France but did also function in Switzerland.

[2] SA acted through its sole shareholder and director, B. The latter was subsequently directly controlled by A. SA, through a *Durchgriff*.

[3] B. and C. SA were not authorized to distribute cards and subscriptions in Switzerland. However, B. contracted with fictitious customers domiciled in France before reselling the subscriptions to Swiss customers at a higher price.

[4] After the distribution contract for France was terminated, B. continued to resell cards and renew subscriptions to customers, despite A. SA's formal notices. A total of 78 customers are affected.

[5] A. SA, as well as three customers, finally filed a criminal complaint against B., which led to his conviction, in particular for fraud. A. SA then sued B. for compensation on the basis of Agency without Authority (hereafter:

«**AwA**», «Gestion d'affaire sans mandat»; Art. 419 ff. of the Swiss Code of Obligations – hereafter: «**SCO**»), but only obtained a small part of the sums claimed.

[6] A. SA appealed to the Federal Supreme Court, resulting in judgment 4A_88/2019. Since the Federal Supreme Court's reasoning sometimes seems abstract, we deem it useful to illustrate it with a few graphs.

Agency without Authority

[7] The fact that B. acted as an agent without authority, willfully and in bad faith, is undisputed. The Federal Supreme Court recalled the conditions of the action on the basis of AwA in paragraph 3.1.1, without, however, exploring the details.

[8] Similarly, while the existence of a need for a link between the agent's activity and profit is undisputed, the doctrine disagrees on the quality and intensity of the required link. However, the Federal Supreme Court does not elaborate on this issue. The link was simply denied in this case, for the reasons we will examine below.

[9] Two questions remain unresolved: the assessment of the gain made by B., and the competing rights of A. SA and C. SA's customers (victims of an unlawful act).

Assessment of the gain

[10] The plaintiff must precisely establish and prove his claim, failing which the claim will be dismissed even if the existence of damage is proven (cf. Art. 42 para. 1 SCO, «A person claiming damages must prove that loss or damage occurred.»). This rule, which is mainly encountered in cases of unlawful acts and contractual breaches, also applies in cases of AwA for assessing the gain to be remitted.

[11] Art. 42 para. 2 SCO tempers this rigorous rule, but its application is itself subject to a very high standard of demonstration. The plaintiff must have established all the elements in his favor for the judge to then assess the damage. In the absence of such proof, the judge will reject the entire application.

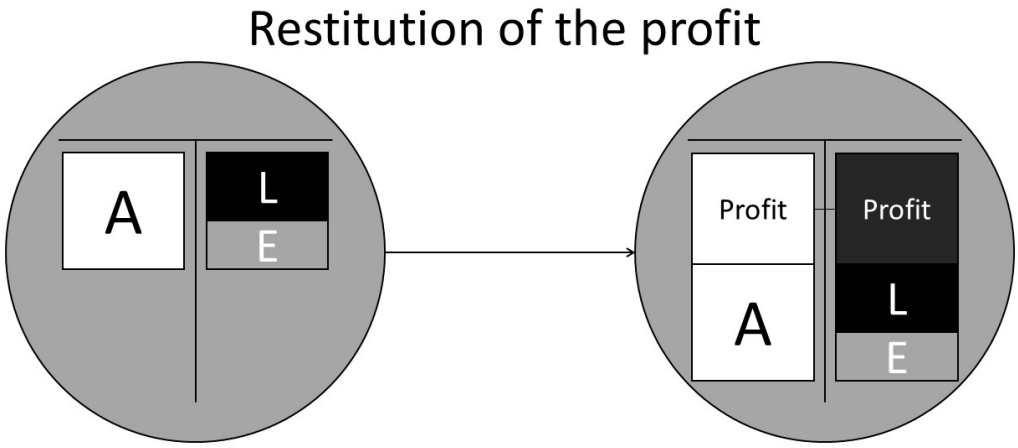
[12] In the case at hand, A. SA had shown only the prices charged for 4 customers out of 78 and had extrapolated the figures for the other customers. This approach, while certainly more convenient, does not meet the strict criteria for determining loss or damage. On the contrary, A. SA should have alleged and proved, for each of the 78 customers, the «official price» it would have charged and the price at which the clients of B. SA were effectively charged.

[13] That being said, A. SA would in any case have been unsuccessful in obtaining the restitution of this gain, for the reasons set out below.

Restitution of the profit

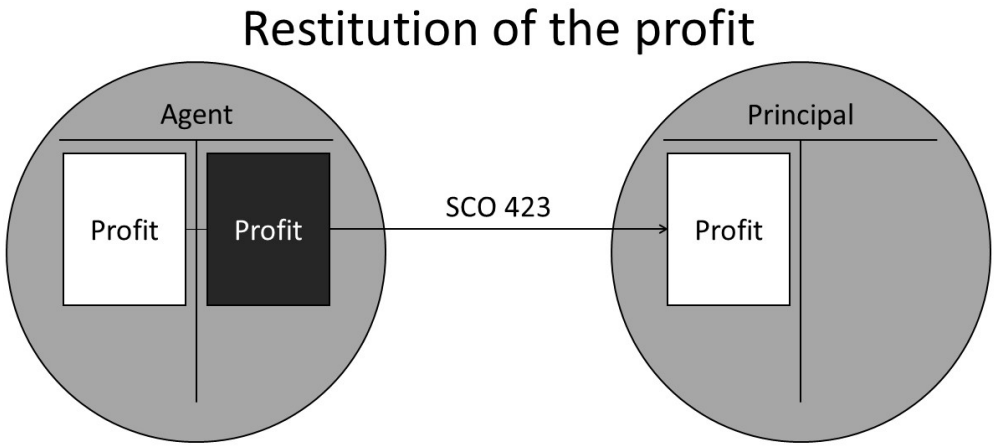
[14] AwA must neither enrich nor impoverish the agent. Thus, the SCO provides that the profit must be restituted to the principal (Art. 423(1) SCO) and that the agent is entitled to reimbursement of his expenses (Arts. 422 and 423(2) SCO).

[15] In accounting terms, this means that if the agent makes a profit (entered on the assets' side of the balance sheet), a comparable debt must be entered on the liabilities side in favor of the principal – it corresponds to the AwA claim of the principal (Art. 423 SCO). Ultimately, the net assets of the manager (his equity) are not affected.



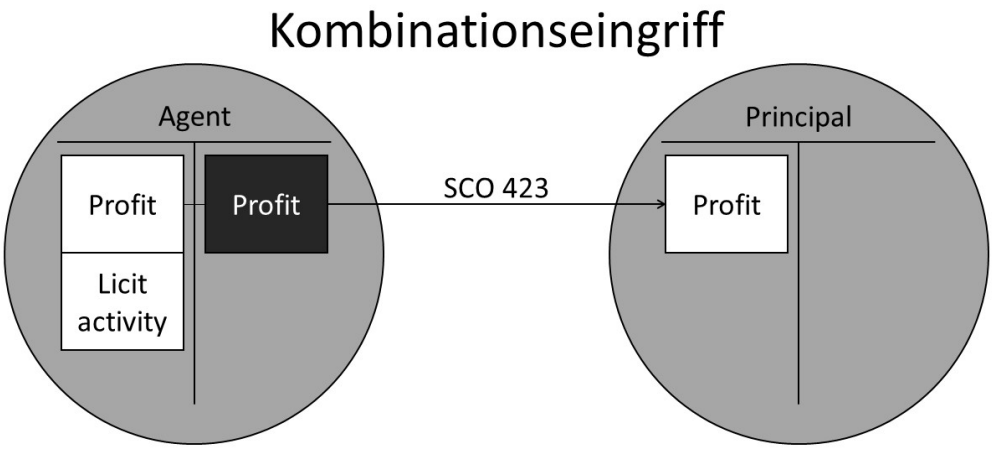
[16] This is, of course, an accounting and a theoretical approach, since if the principal is unaware of the profit made at his own expense or does not act against the agent, the latter will be able to dispose of his profit without hindrance. It is, however, important for the qualification of the parties' claims.

[17] This debt of the agent corresponds to a claim of the principal. Again, from an accounting point of view, one can see that this corresponds to the transfer of the gain obtained from the agent's assets to the principal's assets.



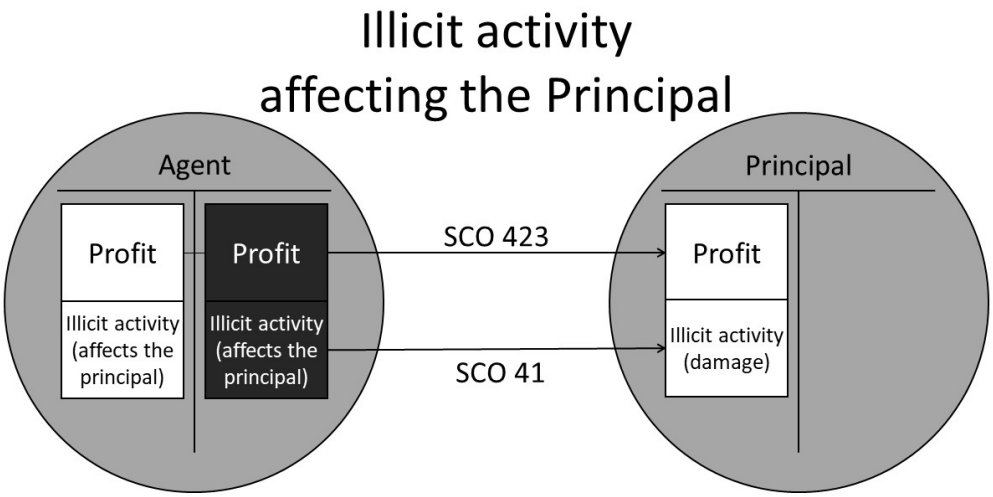
[18] This simple case, which is the one initially envisaged by the law, is sometimes more complicated to grasp. For example, it is conceivable that the agent would not only profit from the principal's business but would also increase his profit through a lawful activity which he carries on – the principal alone would not have made this profit.

[19] This situation is called «concurrence of causes» or «combined infringement» (in German «*Kombinationseingriff*»). In this case, the agent may keep the part resulting from his own (lawful) activity and must return only the part corresponding to the profit made by the sole management of the principal business.



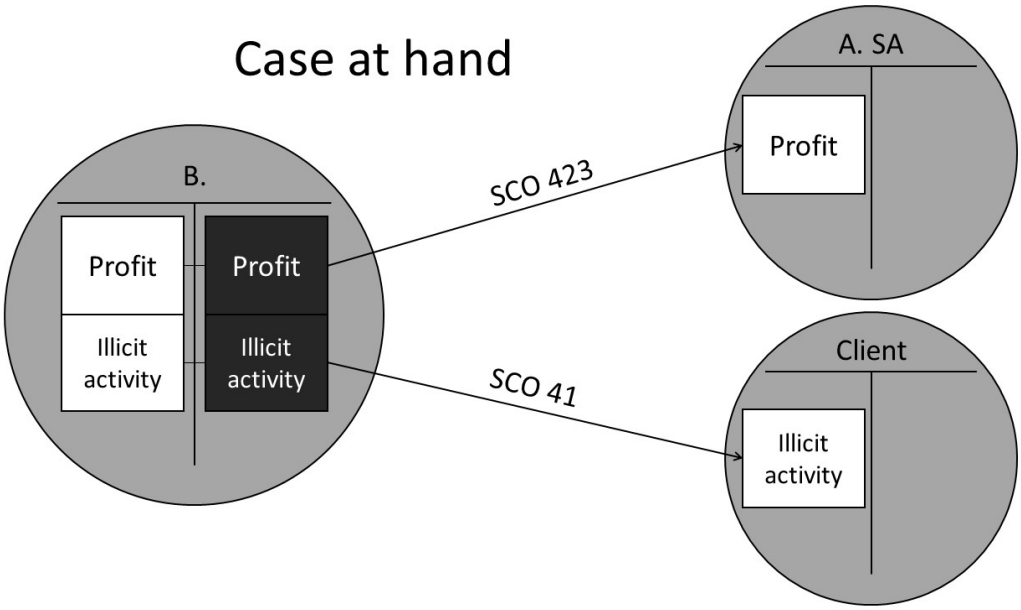
[20] However, the case at hand concerns an unlawful activity carried out by the agent. The latter overcharged for the subscriptions offered, which led to his conviction for fraud. We are therefore neither in a case of «simple» profit, nor in a case of a so-called *Kombinationseingriff*. To decide the case, the Federal Supreme Court reasoning is developed in two steps.

[21] If the unlawful act has been done to the detriment of the principal, the latter may be compensated both for the profit made by the agent and for his damage – the example given is that of a theft, followed by a resale of the stolen item. Even if the principal may file a single lawsuit, the two claims are nevertheless distinct: one derives from tort, the other from AwA (combination of actions, Art. 90 of the Swiss Code of Civil Procedure, «SCCP»).



[22] However, the principal may not rely on an unlawful act to the detriment of a third party. The claims resulting from an unlawful act are a debt owed by the agent to a third party. They are liabilities and reduce the agent's profits and thus his obligation to repay the principal.

[23] In the case at hand, this means that the over-invoicing to the detriment of the clients must be reimbursed to them (the Federal Supreme Court classifies it as unjust enrichment, the contracts concluded with B. being void), but that A. SA cannot claim damages for itself.



[24] A. SA may therefore claim only the amount corresponding to the «official price» of its services and the amount paid by B. – this amount corresponds to what A. SA could have obtained by selling its products directly to the customers concerned.

[25] B. had already retroceded the official price for most of the clients, except for E., for whom only CHF 192 out of CHF 1380 (the «official price») had been retroceded. The difference between these amounts is to be returned to A. SA, but not the difference between the «official price» and the price actually paid by E.

[26] A. SA purports that the clients will not claim restitution of the overpaid amounts. We must concede that this reasoning is probably true: the costs which would have to be incurred by each of the clients in order to recover a few hundred Swiss francs would be disproportionate, and the clients would also be exposed to the risk that B. would be insolvent.

[27] However, this argument is not sufficient to ground a claim by A. SA. It is a *res inter alios acta* which does not concern that company, and the customers are free to act or not to act, without affecting A. SA's situation. A. SA is not entitled to act on behalf of the clients (in French: «*nul ne plaide par procureur*»).

Conclusion

[28] Among the different sources of obligations, it is generally accepted – although some scholars are critical – that unjust enrichment is subsidiary to other actions. This does not mean, however, that such a claim disappears as soon as another type of liability is envisaged. In the present case, the claim of unjust enrichment prevailed, since it represented a claim separate from the agent's profit.

[29] This judgment also illustrates the notion of assets and liabilities and their relationship with SCO claims. An asset that is effectively in a person's estate (an object, a sum of money, etc.) is identical to an asset to be received from a third party (a claim). The source of the right is also irrelevant: Alternative suggestion: a claim based in contract law (a sum of money deposited in a bank account, for example) or tort law (as in the present case) are equivalent, even if the chances of obtaining payment vary greatly.

[30] In accounting terms, crime, AwA, or even unjust enrichment do not pay. The profit of an agent or a tort's perpetrator, if it actually increases their assets, is immediately offset by an equivalent liability - the equity is therefore not altered. As for the principal or the victim, their equity is not affected either if the conditions of an action are met: the claim makes up for the shortfall caused by the wrongful act.

[31] However, the law does not apply automatically, and if the creditor is unaware that he can act, or renounces to act when faced with the procedural obstacles, the distinction between types and sources of assets will become all-important.

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