Bundesstrafgericht
Tribunal pénal fédéral
Tribunale penale federale
Tribunal penal federal
[Federal Criminal Court]

File number: RR.2019. 165
Secondary procedure: RP.2019.39

Judgment of October 16, 2020
Lower Appeals Chamber

Composition

Federal criminal judges
Roy Garré, Chair,
Giorgio Bomio-Giovanascini and
Patrick Robert-Nicoud,
Clerk Victoria Roth

Parties

BANK A., represented by Olivier Wehrli, attorney-at-law,

appellant

against

1. FEDERAL OFFICE OF JUSTICE, CENTRAL OFFICE USA,
2. BANK B., in liquidation, represented by Antonia Mottironi and Yves Klein, attorneys-at-law,

opposing parties

Subject

International Mutual Assistance in Criminal Matters with the United States of America

Handing over for the purpose of forfeiture (Art. 74a IMAC)

Stay of proceedings (Art. 75a (5) IMAC)

Facts:

A. On May 13, 2009, the Department of Justice of the United States of America (hereinafter: DOJ) requested the assistance of the Swiss authorities in the context of an investigation against C., D. et E. for facts relating in particular to financial crimes.

B. The Federal Office of Justice, through its Central Office USA (hereafter: USA Office), by decision of May 14, 2009, agreed to consider the US request, entrusting its execution to the Office of the Attorney General of Switzerland (hereafter: OAGS).

In the context of the execution of this request, the bank A. was requested to provide banking documentation relating to various accounts of which C., respectively one or another of his companies was the holder or beneficial owner in the bank's records.

By several decisions of conclusion issued on July 31, 2009, the USA Office ordered, among other things, the transmission to the US authorities of all banking documentation relating to the following accounts opened at the bank A.:

- No. 1 (from 01/01/2000 to 02/27/2009), No. 2 (from opening to 02/20/2009) and No. 3 (from opening to closing) opened by the bank B. Ltd;
- No. 4 (from opening to 02/20/2009) opened by the bank F. SA;
- No. 5 (from 01/01/2000 to 02/20/2009) opened by the bank G. Ltd;
- No. 6 (from opening to 02/20/2009) and no. 7 opened by C.;
- No. 8 (from 01/01/2000 to 02/20/2009) opened by H. Ltd.

C. The conclusion decisions in question, notified to the bank A., were not appealed against. The aforementioned banking documentation was transmitted to the DOJ by dispatch of October 9, 2009.

D. On February 9, 2017, the DOJ issued a request to the Swiss authorities for remittance of funds based on the final forfeiture order issued on January 25, 2017, by the US District Court for the Southern District of Texas. The DOJ confirmed its request for remittance in its supplemental requests for mutual assistance of March 24, 2017, September 25, 2017, and May 3, 2018.

E. During the enforcement proceedings before the USA Office, the banks A. and B. Ltd filed several observations regarding the remittance requested by the US authorities, the former opposing such a remittance and the latter being in favor of it.

F. By decision of June 12, 2019, the USA Office admitted the mutual assistance requested by the DOJ on February 9, 2017, and ordered the remittance to the US authorities of the assets deposited in accounts No. 1 (balance at the end of 2018: USD 63,823,700 [act. 9.1]), and No. 2 (balance at the end of 2018: USD 41,940,757 (act. 9.1)) held in the bank B., in liquidation, with the bank A. (act. 2).

G. The bank A. is appealing against the above-mentioned decision in a brief dated July 12, 2019, addressed to the Lower Appeals Chamber of the Federal Criminal Court. As a preliminary matter, the appellant requests a stay of the investigation of the present appeal until the USA Office has ruled on the fate of the credit balances in the accounts 8, 5 and 6. The appeal petitions primarily for the annulment of the disputed decision and the dismissal of the request for transfer of funds from the requesting authority, and secondarily for a stay of the proceedings until a decision is reached in the proceeding to contest the claims register brought by the bank A. against the ancillary bankruptcy estate of the bank B. Ltd and currently pending before the Court of First Instance of Geneva (act. 1, p. 3). The case was registered under the number RR.2019.165.

H. In its response of August 19, 2019, the USA Office concludes that the appeal should be dismissed (act. 8).

I. By petition of August 19, 2019, addressed to this Court, the bank B. Ltd – having learned that the bank A. had appealed against the decision of the USA Office of June 12, 2019 – requested to participate in the present appeal proceedings. To this effect, it indicates that it is affected in several ways by the mutual assistance procedure, namely by being the holder of the assets whose remittance is ordered, by also being beneficiary, in its capacity as injured party, of the allocation of part of the forfeited funds, and finally insofar as the appellant secondarily petitioned for a stay of the proceedings pending in Geneva (act. 9).

J. At the invitation of this Court to make determinations on the request of the bank B. to be admitted as a party to the proceedings, the USA Office concludes that

this status should be granted (act. 12) and the appellant refers the matter to the court. It also replies to the response of the USA Office (act. 13).

K. On September 4, 2019, this Court authorized the bank B. Ltd to participate in the appeal proceedings. On that occasion, a copy of the file of the appeal proceedings was submitted to the Court, with the possibility of filing its observations, if any, regarding said proceedings (act. 14). In its observations of September 26, 2019, the bank B. Ltd. argued that the stay of the appeal proceedings should be refused, that the appellant's pleadings were inadmissible insofar as they pertained to certain accounts, and that the other reliefs should be dismissed (act. 18, p. 3).

L. Invited to do so, the USA Office waived its right to file observations on the bank B. Ltd's brief (act. 23) and the appellant took position on the brief on October 14, 2019 (act. 25).

M. On November 27 and 29, 2019, the USA Office issued three new decisions of remittance related to the DOJ's request of February 9, 2017. Thus, by decision of November 27, 2019, the USA Office ordered the remittance to the US authorities of the assets deposited in account No. 5 held in the name of the bank G., in liquidation, with the bank A., in the amount of USD 15,220,000, and lifted the freezing order issued on July 31, 2009, for all remaining assets.

N. Also by a decision of November 27, 2019, the USA Office ordered the remittance to the US authorities of the assets deposited in account No. 8 held in the name of H. Ltd. with the bank A.

O. Finally, by a decision dated November 29, 2019, the USA Office ordered the remittance to the US authorities of the assets deposited in account No. 6 held in C.'s name with the bank A.

P. The bank A. appealed, in three separate appeal briefs dated December 19, 2019, against the decisions of the USA Office of November 27 and 29, 2019. The pleadings of the three appeals are in substance identical, i.e. to join the appeals with case RR.2019.165 pending before this Court, to annul the disputed decisions and to dismiss the request of transfer of funds of the United

States of America. Three new case numbers were registered for these appeals: RR.2019. 349, RR. 2019.350 and RR.2019.351.

Q. In its responses of January 20, 2020, the USA Office argues that the appeals should be dismissed and refers mainly to the contested decisions (act. 6 *in* RR.2019.349, RR.2019.350 and RR.2019.351). The appellant maintains its pleadings in its replies of January 31, 2020 (act. 8 *in RR.*2019.349, RR.2019.350 and RR.2019.351).

R. By a letter dated April 24, 2020, referring to the four cases pending before this Court, the bank A. provided the Court with copies of witness testimony heard in a civil proceeding pending before the US District Court for the Northern District of Texas. The bank A. argued that these hearings confirmed that the appellant did not have knowledge of the fraud and, therefore, acted in good faith (act. 28 and act. 10 *in* RR.2019.349, RR.2019.350 and RR.2019.351).

S. On May 18, 2020, the bank B. Ltd filed submissions on the above-mentioned letter and its annexes, arguing that they are inadmissible, and that they would confirm rather than invalidate the appellant's lack of good faith (act. 34).

T. On July 21, 2020, the bank A. informed this Court that it had filed a request for recusal against I., who is in charge of the processing of the US application within the FOJ, on the grounds that its right to be heard had been breached since there was no record in the case file of an interview that had taken place between the FOJ and the bank B. Ltd, to which the bank A. had not been invited (act. 36).

The arguments and evidence invoked by the parties will be included, if necessary, in the recitals in law.

The Court considers in law:

1.

1.1 Mutual legal assistance in criminal matters between the United States of America and the Swiss Confederation is governed by the Treaty on Mutual Assistance in Criminal Matters between the United States of America and the Swiss Confederation (TEJUS; SR 0.351.933.6) and the Federal Act implementing said treaty (LTEJUS; SR 351.93).

1.2 However, the International Mutual Assistance in Criminal Matters Act of March 20, 1981 (IMAC; SR 351.1) and its implementing ordinance (IMOC; SR 351.11) apply to matters not explicitly or implicitly regulated by the treaty, and where they are more favorable to mutual assistance (ATF 142 IV 250 (3); 140 IV 123 (2); 137 IV 33 (2.2)). The application of the most favorable law must take place with due respect for fundamental rights (ATF 135 IV 212 (2.3); 123 II 595 (7c)).

1.3 Pursuant to Art. 17 (1) LTEJUS, the decision of the USA Office regarding the termination of the mutual assistance proceeding and, jointly, the previous incidental decisions of the enforcing authority may be appealed before the Lower Appeals Chamber of the Federal Criminal Court.

1.4 Filed within 30 days from the notification of the contested decision (Art. 17c LTEJUS), the appeal is filed in due time.

1.5

1.5.1 Pursuant to Art. 17a LTEJUS, anyone who is personally and directly affected by a mutual assistance measure and has a legitimate interest in its cancellation or modification is entitled to an appeal.

1.5.2 In specifying this provision, Art. 9a(a) IMOC recognizes the holder of a bank account as having the right to appeal against the remittance to the requesting State of information relating to that account (see ATF 137 IV 134 recital 5 and 118 lb 547 recital 1d). In the case of a banking institution, case law has had the occasion to clarify that the banking institution is not entitled to appeal when, without being affected in the conduct of its own affairs, it must simply submit documents concerning its customers' accounts and, through its employees, provide additional explanations concerning these documents (ATF 128 Il 211 recital 2.3). On the other hand, if the bank is affected in its own interests by the

disputed measure of mutual assistance, its right to appeal must be recognized. This is the case in particular when the bank is itself the holder of the accounts in question, or when the requested information concerns the bank's own internal activity (ATF 128 II 211 recital 2.4 and 2.5). More specifically, in the case of the handing over of bank assets pursuant to Art. 74a IMAC, as is the case here, case law has specified that third parties with an *in rem* right or a limited *in rem* right are entitled to raise their claims on the objects or assets being handed over to the requesting State (TPF 2014 113 recital 3.2.2, decision of the Federal Criminal Court RR.2019.132 of January 29, 2020 recital 1.4).

1.6 In this case, the appellant is a party inasmuch as it is claiming a right to the assets in dispute within the meaning of Art. 74a IMAC. As the appeal is admissible, it is appropriate to proceed with the case.

2.

2.1. The appellant requested that the present case be joined with the petitions concerning the assets of the bank G. Ltd, H. and C. (act. 1, p. 30), i.e. the cases registered under numbers RR.2019.349, RR.2019.350 and RR.2019.351 by this Court.

2.2. For the sake of procedural efficiency, the authority ruling on several individual petitions may join them; or, conversely, the authority ruling on a joint petition by several constituents (joint parties) or on differing claims brought by the same constituent, may divide them; it is procedural law that governs the conditions for the joinder and separation of proceedings (BOVAY, Procédure administrative, 2nd ed. 2015, p. 218 ff.). Although it is not provided for by the PA [Administrative Procedure Act], which is applicable to the present case by reference to Art. 12 (1) IMAC and 39 (2)(c) LOAP, the institution of joinder of proceedings is nevertheless permitted in practice (see Federal Criminal Court judgments RR.2008.190 of February 26, 2009 recital 1; RR.2008.216+RR.2008.225-230 of November 20, 2008, recital 1.2; MOSER/BEUSCH/KNEUBÜHLER, Prozessieren vor dem Bundesverwaltungsgericht, 2nd ed. 2013, § 3.17, p. 144 ff.).

2.3. In the present case, even if the cases are based on a similar factual situation and raise similar grievances, there is no justification for joining the present case to the other three since the bank B. Ltd is also a party to this proceeding, whereas it is not in the other proceedings.

3. In a grievance that should be examined first, given its formal nature, the appellant alleges a violation of the right to be heard. The USA Office has allegedly kept in its possession for more than four months the findings of the bank B. Ltd of March 20, 2019, which were communicated to it only after the decision had been made.

The appellant therefore considers that it did not have full access to the case file (act. 1, p. 31).

3.1 Art. 29 (2) of the Federal Constitution of Switzerland of April 18, 1999 (Cst.; SR 101) enshrines the right to be heard, which also derives from the right to a fair trial (Art. 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms in force for Switzerland since November 28, 1974 [ECHR; RS 0.101]). The right to be heard includes the right of the interested party to express its views on the relevant elements of a case before a decision affecting its legal position is made (ATF 137 II 266 recital 3.2 p. 270). This right relates primarily to questions of fact. The parties may also have to be heard on questions of law when the authority concerned intends to rely on legal standards whose consideration could not reasonably have been foreseen by the parties (ATF 129 II 492 recital 2.2 p. 505 and references cited).

3.2 Among the implications of the right to be heard, therefore, is the right of the parties to express themselves on the relevant elements of a case before a decision affecting their legal situation is made (ATF 135 II 286 recital 5.1 and references cited; 129 II 497 recital 2.2; 129 I 85 recital 4.1). The right to consult the case file is therefore one aspect of the right to be heard (ATF 126 I 7 recital 2b and the judgments cited). In cases of mutual legal assistance, this right is implemented, inter alia, by Art. 80b IMAC and by Arts. 26 and 27 AP (applicable by reference to Art. 12 (1) IMAC and Art. 39 (2)(b) LOAP). These provisions allow the interested party to consult the case file, unless certain interests are opposed (Art. 80b (2) IMAC). According to Art. 80b (1) IMAC, the interested parties may participate in the proceedings and consult the file if the protection of their interests so requires. The right to consult the file extends only to those documents that are decisive for the outcome of the case, i.e., all those that the authority takes into consideration in making its decision; it is therefore forbidden to refer to documents of which the parties have no knowledge (Art. 26 (1)(a, b and c) AP; ATF 132 II 485 recital 3.2; 121 I 225 recital 2a; 119 Ia 139 recital 2d; 118 Ib 438 recital 3; judgments of the Federal Court 1A.149/2006 and 1A.175/2006 of November 27, 2006, recital 2.1; 1A.247/2000 of November 27, 2000 recital 3a; ZIMMERMANN, *La coopération judiciaire internationale en matière pénale*, 5th ed. 2019, No. 477, p. 515). The right mainly pertains to the request itself and the attached documents, since it is on the basis of these documents that its admissibility is determined. Since the right to consult the file extends only to the decisive documents that led to the contested decision, the consultation of irrelevant documents may, on the contrary, be denied. In this case, it must be

noted that the USA Office did not rely on the submissions of the bank B. Ltd – which did not bring any new exhibits – to make the contested decision and that this document was in no way decisive for the outcome of the case. The claim of violation of the right to be heard must therefore be dismissed. It should also be pointed out that, since the submissions in question were ultimately handed over to the appellant, the appellant had the opportunity to comment on them in the course of the appeal proceeding, given this Court's authority to decide the case. Thus, a potential violation of the right to be heard – which is to be excluded in this case – could have been remedied in the present appeal proceeding, since this Court has free powers of discretion (see Art. 49 AP and TPF 2008 172 recital 2.3). The grievance must therefore be dismissed.

4. In the contested decision, the USA Office ordered the remittance to the US authorities of the assets deposited in accounts No. 1 and No. 2 held in the name of the bank B. Ltd, in liquidation, with the bank A., pursuant to Art. 74a IMAC. The appellant argues that the conditions of Art. 74a IMAC are not met.

4.1 According to Art. 74a IMAC, at the request of the competent foreign authority, objects or assets frozen as a precautionary measure may, at the end of the mutual assistance proceeding (Art. 80d IMAC), be handed over to said authority for forfeiture or return to the rightful claimant (para. 1). Art. 74a (1) IMAC gives the authority broad discretion to decide whether and under what conditions remittance may take place. While this power does not allow it to question the content of the foreign decision (except in the case of a violation of public policy), the executing authority is obliged to examine whether the required cooperation falls within the framework authorized by Art. 74a IMAC (ATF 129 II 453 recital 3.2; ZIMMERMANN, *op. cit.,* No. 338 and the references cited). The objects or assets in question include the instruments used to commit the offense, the proceeds or result of the offense, the replacement value and the illicit benefit, as well as gifts and other advantages that have served or were intended to serve to persuade or reward the offender (including replacement value, para. 2). With regard to the timing of the handover, the law expressly provided that it may be done "at any stage of the foreign proceedings, as a general rule upon a final and enforceable decision from the requesting State" (para. 2). Swiss law has used the expression "as a general rule" to allow for a rapid and informal procedure in cases where restitution is clearly necessary; for example, where there is no doubt as to the identification of the frozen assets and their illicit origin (ATF 123 II 595 recital 4f and references cited; 123 II 68 recital 4a; 123 II 134 recital 5c; judgment of the Federal Criminal Court RR.2015.138 of August 18, 2015, recital 4.1.1). Furthermore, a freezing order in the requesting State is considered a final decision if the foreign law provides that it is equivalent to a final enforcement order, after the judgment of conviction has entered into force. The decision that is enforceable and final in the requesting State must emanate from a judicial, criminal, civil or

administrative authority (ZIMMERMANN, *op. cit.,* no. 338; ATF 123 II 595 recital 5e p. 611). Switzerland, as the requested State, is not required in principle to judge the merits of this decision. The procedure instituted by Art. 74a IMAC is not an exequatur procedure, and the exceptions provided for in Art. 95 to 96 IMAC are not applicable. However, the requested authority may ensure that the assets whose restitution is requested correspond to the objects described in Art. 74a (2)(a-c) IMAC, i.e. that they are the instrument or proceeds of the offense or the reward attributed to the offender. In addition, the foreign procedure must also satisfy the general guarantees under the ECHR or the UN Covenant II. Finally, the claims of the injured party, of an authority or of a good-faith third-party acquirer, as well as the requirements for criminal proceedings in Switzerland, must be taken into account pursuant to Art. 74a (4) IMAC (ATF 129 II 453 recital 3.2).

4.2

4.2.1 The appellant firstly maintains that the condition of Art. 74a (2)(a) IMAC is not met: there is no link between the accounts holding the litigious assets and the fraud committed by C. The appellant argues that funds in the accounts in question are not constituted in their entirety from the proceeds of the crime, and that the US forfeiture order is in fact a compensation claim. Moreover, the principle of trust to which the USA Office referred in the disputed decision could not be applied here, since there was a final judgment in the United States. Thus, faced with such a judgment, the requesting authority would have had to prove all the facts alleged. However, the jury's verdict of March 8, 2012, allegedly did not contain any reasoning as to the link between the funds and the acts committed by C., and the answers to a questionnaire do not in any case constitute sufficient reasoning within the meaning of the case law (act. 1, pp. 31-36).

4.2.2 The USA Office explains that the operative part of the final forfeiture order expressly refers to the two bank accounts, the assets of which are being requested for handover, and that the September 25, 2017 supplement provided by the DOJ states that the assets deposited in the accounts represented the fraudulent proceeds of the acts that C. was alleged to have committed. It thus concludes, on the basis of the final and enforceable judgment, corroborated by the DOJ's explanations and in accordance with the principle of trust, that the

requesting authority did indeed issue a judgment of forfeiture of the proceeds of the offense and not a judgment pronouncing a replacement claim (act. 9.1, pp. 8-9).

4.2.3 From the outset, it should be noted that the request for the handing over of the funds held in accounts No. 1 and No. 2 is based on a US forfeiture order of January 25, 2017 (see act. 8.1). Said decision, which is final and enforceable, emanates from a US criminal judicial authority, namely the "United States District Court, Southern District of Texas, Houston division." The DOJ also confirmed in its supplements to the letter of request dated March 24, 2017, September 25, 2017 and May 3, 2018 *(see* acts 8.4, 8.5 and 8.23), the final and enforceable nature of the forfeiture order. It should be noted that the forfeiture order is based on the "Special Jury Verdict" dated March 8, 2012, which expressly states that all of the funds in accounts No. 1 and No. 2 represent the fraudulent proceeds of the acts alleged against C. (see act. 8.3). By virtue of the principles of trust and international good faith that govern relations between States, it is generally accepted that the requested State relies on the explanations provided by the requesting State (see Federal Court judgment 1C_491/2015 of November 2, 2015, recital 1.3.2; LUDWICZAK GLASSEY, *Entraide judiciaire internationale en matière pénale*, 2018, no. 56). These explanations can therefore only be called into question when the declarations of the foreign State are manifestly contradictory or contrary to the truth (see ATF 121 I 181, point 2c/aa). As an exception, an examination of the documentation provided by the State may take place in cases where the flagrant violation of foreign procedural law makes the extradition request appear to be an abuse of right; moreover, this would raise doubts as to the conformity of the foreign procedure with the fundamental rights of the defense (Federal Court judgment 1A.15/2002 of March 5, 2002 recit. 3.2). Thus, contrary to what the petitioner maintains, the principle of trust applies in this case insofar as the Swiss authority has no reason to doubt, in light of the facts and the legal conclusions reached by the foreign authorities, that the forfeited assets are related to the crimes of which C. was convicted. Moreover, the USA Office does not have to decide on the merits of the US decision, but must simply ensure that the foreign proceeding met the general guarantees under the ECHR or the UN Covenant. In the present case, there is no reason to doubt that the proceeding in the United States was conducted properly; consequently, the condition of Art. 74a (2)(a) IMAC is met.

4.3 Secondly, the appellant is of the opinion that the conditions of Art. 74a (4)(c) IMAC are met.

4.3.1 Art. 74a (4)(c) IMAC provides that objects or assets frozen as a precautionary measure may be retained in Switzerland if a person extraneous to the offense and whose claims are not guaranteed by the requesting State makes a reasonable claim that he has acquired rights to these objects or assets in good faith in Switzerland or if, being habitually resident in Switzerland, said person shows probable cause that he acquired rights to them in good faith abroad.

4.3.2 By setting out essentially the same grievances already raised before the enforcement authority (act. 8.17), the appellant argues that, in addition to being uninvolved with the offense, it was not informed by the US judge about the possibility of opposing the forfeiture. As a result, it was not able to assert it rights as a third-party garnishee and its claims were therefore not guaranteed by the requesting state. Secondly, the appellant submits that the bank A. is a creditor of the bank B. Ltd and that, on the basis of a pledge deed signed in 2004, this claim is therefore secured by pledge. Finally, it alleges that these rights were acquired in good faith. Indeed, the mere fact that the bank A. was negligent and did not comply with certain regulatory provisions relating to its duty of supervision is not sufficient grounds to establish an absence of good faith. The appellant asserts that it could not know or could not envisage the criminal origin of the funds (act. 1, pp. 36-50).

4.3.3 Prior to this, and as noted by both the USA Office and the bank A., the latter was never suspected of having taken part, in any capacity whatsoever, in the illegal set-up established by C. The bank A. must therefore be considered as being uninvolved with the offense that gave rise to the request for assistance.

It is therefore necessary to examine whether the bank A. was able to exercise its rights and assert its claims before the US authorities.

4.3.4 In this case, it appears from the case file that the US forfeiture order was published on June 6, 2012. This publication contained specific instructions on where and how to file a petition and, therefore, to assert one's rights, within 60 days from the date of publication (act. 8.34, p. 80). It appears that the bank A. did not make use of this option, claiming, on the one hand, that the very existence of a possibility to intervene in the foreign criminal proceedings does not constitute a sufficient guarantee and would therefore not be an obstacle to handing over the assets to the secured creditor. On the other hand, the appellant argues that third parties affected by a forfeiture measure, as in the present case, should be directly informed of such by the judge; otherwise, the steps taken by the pledgee to keep itself informed of the foreign forfeiture proceedings concerning him would become too costly and disproportionate. This explanation cannot be admitted.

Indeed, it does not appear from the case law relating to Art. 74a (4)(c) IMAC that the publication of an order would not be an entirely adequate means of informing third parties affected by a forfeiture to assert their rights. Moreover, as the USA Office rightly points out, a bank such as the bank A. had the ability and resources to monitor the proceedings of the trial against C, especially since C. was an important client of the bank, who held several accounts with the appellant. The appellant is also represented in the United States by a law firm. Moreover, the arrest of C. in 2009, his sentence to 110 years in prison in 2012 and the bankruptcy of the banks of his group from the end of 1994 certainly could not have gone unnoticed by the appellant. It should also be noted that, following the DOJ's request for mutual assistance of May 13, 2009, the employees of the bank A. who handled relations with C. were examined by the OAGS regarding this case in early 2012. They were also required to produce documentation regarding C.'s relationships – again in the context of this mutual assistance request – meaning as early as 2012, the appellant was already actively engaged in collaborating with the proceedings conducted by the requesting authority (see judgment of the Federal Criminal Court RR.2012.81 of December 12, 2012). The appellant was therefore aware of the proceedings carried out on the US territory. It was thus within its responsibility to assert its claims before the US authorities – and it had the possibility to do so – but it did not wish to make use of this possibility.

In view of the above, the bank A.'s claims were guaranteed by the requesting State. Thus, this finding alone makes it possible to rule out the application of Art. 74a (4)(c) IMAC. That said, and for the sake of completeness, this Court will also examine the other conditions of said provision.

4.3.5 In this respect, it is necessary to examine whether the bank A. has acquired *in rem* rights on the disputed assets, i.e. a right of lien, since a mere claim is not sufficient to invoke Art. 74a (4)(c) IMAC. Indeed, according to the case law and doctrine, which are consistent on this subject, only third parties to the benefit of a right *in rem* or a limited right *in rem* on the forfeited objects or assets can assert claims (Federal Court judgments 5A_832/2015 of February 19, 2016, recital 4.3.1; 1C_166/2009 of July 3, 2009, recital 2.3.4; HARARI, *Remise internationale d'objets et valeurs, réflexions à l'occasion de la modification de l'EIMP*, *in: Etudes en l'honneur de Dominique Poncet*, 1997, p. 188).

4.3.5.1 The bank A. argues that it has a claim against the bank B. Ltd based on Art. 402 (2) CO. It argues that, in its capacity as C.'s banker, an action for payment is currently pending against it, for which the class action plaintiffs assert a claim for an amount of several billion dollars. Such third-party claims allegedly constitute “damages” within the meaning of the above provision. In addition, in order to satisfy the condition of acquired rights, it asserts that said claim would be secured by pledge under the pledge agreement entered into between the bank A. and the bank B. Ltd on June 12, 2004 (act. 1, pp. 38-41).

4.3.5.2 It appears that the claim invoked by the appellant under art. 402 (2) CO corresponds to compensation for damages it allegedly suffered, which it is attempting to have recognized by the court through the class action case. Thus, this is not a current or specified claim but, on the contrary, a future and unspecified claim, since it depends on the outcome of the US proceedings. In this respect, Federal Court case law explains that claims secured by a pledge must be determinable or sufficiently determinable at the time of the conclusion of the pledge agreement (see Federal Court decision 4A_81/2016 of October 3, 2016 recital 2.2.2). It specifies that possible future claims, in particular those of banks against their customers, are sufficiently determinable at the time of the conclusion of the pledge agreement if the parties could reasonably expect them to occur. The bank A. argues that, given that the bank B. Ltd concealed its financial situation from the bank A., at the time of the conclusion of the pledge deed in 2004, the bank B. Ltd could certainly foresee that future claims could be raised against it as a result. This reasoning is contradictory to say the least, insofar as the appellant itself vigorously asserts throughout its appeal that both the bank B. Ltd and the bank A. were unaware of C.'s fraud. In any event, this argument cannot be admitted. Indeed, contrary to what the appellant argues, the claim’s determinability or even sufficient determinability is far from given. It seems highly unlikely that, at the time the pledge agreement was entered into in 2004, the parties, and especially the bank A., could have been able to reasonably expect the occurrence of this payment action in the United States, which is the consequence of the fraudulent transfers ordered by C.. In this respect, it should be pointed out that the loan agreement for an amount of USD 95,000,000 granted by the bank to C. himself on November 10, 2004, which constituted the consideration for the pledge deed of June 12, 2004, was quickly repaid in full, such that any potential specific claim on which the appellant could have based its argument ceased to exist a long time ago. In view of the above, the appellant

thus fails to demonstrate the plausibility of its claim; consequently, in accordance with the principle according to which the right of lien cannot exist independently of the secured claim (Federal Court judgment 4A_81/2016 recital 2.2.1), the right of lien is also lacking. The condition of Art. 74a (4)(c) IMAC relating to the rights *in rem* acquired by the bank A. is therefore not met.

4.3.6 It remains to be determined – again for the sake of completeness (see above, para. 4.3.4) – whether the interested party has shown probable cause that it has acquired rights in good faith.

4.3.6.1 The concept of good faith in the sense of Art. 74a (4) IMAC is the same as that of Art. 70 (2) PC. The latter provides (quoting the text of Art. 59 (1)(2) aPC) that "forfeiture is not ordered when a third party has acquired the assets in ignorance of the facts that would have justified it..." (AEPLI, Basler Kommentar, 2015, no. 61 *ad* Art. 74a IMAP; HARARARI, *op. cit.,* p. 192ff.). As soon as the third party knows or cannot be unaware that the assets are the result of the offense, that third party is not protected (DUPUIS *et al.*, *Petit Commentaire du Code pénal,* 2nd ed. 2017, no. 21 *ad* Art. 70 CP); this is notably the case when, even though the third party is not a handler of stolen goods, he has acted in the knowledge that the assets acquired were the result or retribution for an offense or when, in view of the circumstances, he should have presumed this (Dispatch of the Federal Council concerning the amendment of the Swiss Penal Code and the Military Penal Code of June 30, 1993 [introducing in particular Art. 59 aPC cited above], FF 1993 III 269, 301). All the circumstances must be taken into consideration, in particular the fact that the third party had the opportunity to obtain information (see BAUMANN, *Basler Kommentar*, 4th ed. 2019, no. 58 *ad* Art. 70/71 CP). A company is responsible for knowledge of its own corporate bodies – *de facto* and *de jure* (Federal Criminal Court decision BB.2010.71-75 of February 18, 2011, recital 5.2 and 5.3; BAUMANN, *ibid.).*

4.3.6.2 Therefore, the question arises of whether the bank A. could have presumed, in view of the circumstances, that at the time it entered into the pledge deed on June 12, 2004, the origin of the funds was unlawful.

At the outset, the appellant points out, once again, that the principle of trust cannot be applied to a request for handing over when the foreign criminal proceedings have been completed, since the requesting State is no longer at the beginning of its investigation and that it should therefore clearly and transparently explain the results of the proceedings (act. 1, p. 45). This first

argument is not relevant, as demonstrated above (see 4.2.3); the principle of trust governs relations between States in matters of mutual assistance, and it is accepted that the requested State may rely on the explanations provided by the requesting State.

The bank A. persists in maintaining its ignorance, as well as that of the H. Group's bank account manager and manager of the bank A., J., of the fraudulent scheme set up by C., at the time of conclusion of the deed of June 12, 2004, and of the loan of USD 95,000,000.00 of November 10, 2004.

Based on the facts set out in the supplement to the request for assistance of May 3, 2018, it appears that J was the Executive Vice President, Branch Manager and Manager of the Asset Section of the bank A. in Switzerland. He was the contact point of the bank A. in Switzerland for C. and all H. entities (act. 8.24, p. 1). In this supplement, the DOJ explains that in view of J.'s position within the bank, he could not be ignorant of the fact that C. was most probably involved in a fraudulent money laundering scheme at the time of the signature of the pledge deed of June 12, 2004, and the loan granted by the bank A. of USD 95,000,000.00 on November 10, 2004. The USA Office also refers to a due diligence report drawn up on September 5, 2000 – i.e. before the signing of the abovementioned deeds and at the bank A.'s request – by the company *Proximal Consulting,* which expressly mentioned C.'s highly dubious reputation and the fact that the bank B. Ltd had been used to launder money from drug trafficking in Mexico (Act. 1.94). In this respect, and in accordance with Federal Court case law, the recklessness of the third party with regard to the facts justifying the forfeiture is sufficient. Thus, the third party must at least consider the existence of facts that would be grounds for forfeiture to be seriously possible, either because it knows the offenses from which the assets originated, or, at the very least, because there were serious indications that the assets originated from an offense (Federal Court decision 6S.298/2005 of February 24, 2006, recital 4.2). In these circumstances, J's confidence in the bank B. Ltd, and the fact that he did not ask for more details on the source of the money and C.'s ability to use the bank B. Ltd's assets to secure the USD 95,000,000.00 loan and conclude said pledge deed, appear entirely unjustified. It is true, as raised by the appellant, that an order of discontinuance was issued against J on March 18, 2016, based on a lack of awareness and willingness to participate in the fraud. It should be noted, however, that the present administrative proceeding does not concern an individual but a company, namely the bank A., and J.'s behavior must be attributed to it in view of his role and duties (see judgment of the Federal Criminal Court BB.2010.71-75 of February 18, 2011, recital 5.2 and 5.3). In any event, it

appears obvious that the bank A. has not demonstrated that it has taken all the necessary steps to ascertain the origin of the money and the regularity of these funds. FINMA, in its decision of August 30, 2013, and the FAC [Federal Administrative Court], in its decision of October 4, 2016, have also confirmed that the bank A. seriously breached supervisory law (act. 1.50).

The depositions of several witnesses in the civil proceedings pending in the United States, produced by the appellant on April 24, 2020, and which would allegedly confirm that J., like several other high-ranking executives of the H group, had no knowledge whatsoever of the fraud orchestrated by C. (act. 28), are not of such a nature to overturn the foregoing conclusions, and the question of the admissibility of these new pleas – an issue raised by the bank B. Ltd (see act. 34, p. 1) –- may remain open for the following reasons. The alleged ignorance of the fraud by the H group's executives, as well as their assertions that J. was no more aware of the fraud than they were, are not sufficient to demonstrate the good faith of the appellant. Indeed, even if the appellant asserts that "Ms. E. [Chief Officer of H. Company since 2005], who has a plea agreement with the DOJ requiring her full cooperation, testified under oath that she was unaware of the fraud until February 2009", it should be remembered that Ms. E. was also prosecuted in the investigation against C., so her claims should be treated with caution. Moreover, this in no way relieves the appellant, which is subject to its own duties and responsibilities and is therefore accountable for its acts or omissions.

4.4 In view of all the circumstances, the USA Office admitted that the appellant did not provide the proof required by Art. 74a (4)(c) EIMP. The bank A. should have presumed that the funds were criminal and should have at least been more careful in light of the hints of money laundering, which it was not. It follows therefrom that the appellant did not show probable cause that it acquired rights in good faith within the meaning of Art. 74a (4) IMAC. The grievance alleging a breach of this provision is therefore ill-founded.

5. In view of the above, the contested decision must be confirmed, and the appeal must be dismissed.

6. Secondarily, the appellant requests a stay of the proceedings based on Art. 74a (5) IMAP until the action to contest the claims register, pending before the Geneva courts, is ruled upon. It argues that it is not the task of the Federal Office to carry

out a detailed examination of civil law matters, this task being the responsibility of the civil judge; therefore, when doubts remain as to the validity of the pledge, the problem must be submitted to the competent jurisdiction (act. 1, pp. 50-52).

6.1 According to Art. 74a (5) IMAC, claims made by a person entitled to objects or assets in accordance with paragraph 4 of the IMAC result in a stay of the handover of such objects or assets to the requesting State until adjudicated by law. The objects or assets in dispute are only delivered to the entitled person if the requesting State so consents (letter a); if, in the case of paragraph 4 letter b, the authority so consents (letter b); or if the validity of the claim is recognized by a Swiss judicial authority (letter c).

6.2 In the present case, both the USA Office and the Court have sufficiently demonstrated that the appellant's claims were unfounded; consequently, in accordance with the principle of promptness, there is no reason to wait for the outcome of the Geneva proceedings; rather, the mutual assistance procedure should be continued in order to be able to proceed with the remittance of the funds to the US authorities.

7. As a general rule, the costs of proceedings, including the decree fee, chancery fees and disbursements, are borne by the unsuccessful parties (Art. 63 (1) AP, applicable by reference to Art. 39 (2)(b) LOAP). The amount of the fee is calculated according to the size and difficulty of the case, the way in which the parties proceed, their financial situation and the chancery fees (Art. 73 (2) LOAP). The appellant shall therefore bear the costs of the present judgment, which are set at CHF 30,000.00 (see Art. 8 (3)(b) of the Regulations of the Federal Criminal Court on costs, fees, expenses and indemnities in federal criminal proceedings of August 31, 2010 [RFPPF; RS 173.713.162], and Art. 63 (4bis)(b) PA), covered by the advance payment of court fees.

8. The appeal authority may award, ex officio or on request, to the party that has been wholly or partially successful, compensation for the necessary and relatively high costs incurred by said party (Art. 64 (1) AP). In the present case, the bank B. Ltd is successful and is thus entitled to compensation for the expenses incurred in these proceedings. Since the bank B. Ltd's counsel did not produce a list of transactions carried out, the Court ruled within the limits allowed by the RFPPF. In view of the scope and difficulty of the case, the compensation is fixed *ex aequo et bono* at CHF 2,000.00, to be paid by the appellant.

On these grounds, the Lower Appeals Chamber pronounces as follows:

1. The appeal is dismissed.

2. A fee of CHF 30,000.00, covered by the advance of costs already paid, is charged to the appellant.

3. A compensation of CHF 2,000.00 is awarded to the bank B., in liquidation, at the expense of the appellant.

Bellinzona, October 16, 2020

On behalf of the Lower Appeals Chamber
of the Federal Criminal Court

The presiding judge: The clerk:

Distribution

Mr. Olivier Wehrli
Federal Office of Justice, Central USA Office
Antonia Mottironi and Yves Klein

Grounds for appeal

An appeal against a decision on international mutual assistance in criminal matters must be filed with the Federal Court within 10 days of notification of the complete judgment (Art. 100 (1) and (2)(b) FCA).

An appeal is only admissible against a decision rendered in matters of international mutual assistance in criminal matters if it relates to an extradition, a seizure, the transfer of objects or assets, or the transmission of secret or confidential information, and if it concerns a particularly important case (Art. 84 (1) FSCA). A case is particularly important if there is reason to assume that the proceedings abroad violate fundamental principles or contain other serious defects (Art. 84 (2) FSCA).