CENTRE DE DROIT
BANCAIRE ET FINANCIER

Claims clause

Late disputes over banking transactions

Par Célian Hirsch le 3 April 2021

Under what conditions does a complaint clause take effect ? In a ruling dated 1 December 2020, the Geneva Court of Justice examined this issue in a case in which a client had delayed contesting transactions allegedly carried out without her instructions (ACJC 1747/2020, now final).

The client, who studied finance and worked at a bank in England, opened an account in Geneva. She did not grant the bank any mandate for asset management or investment advice. She signed the contractual documentation, which included a residual bank clause and a complaint clause. The latter read as follows :

'*Any complaints of the Account Holder regarding the execution or non-execution of orders of any kind, or objections to a statement of account or safekeeping account, or other communications, shall be submitted to the Bank immediately, or at the latest no later than one month after receipt of the corresponding advice.* (…) *The Account Holder shall bear any damages and/or losses resulting from late objections. (…)*'

The client and her relationship manager developed a friendly relationship. They communicated regularly by telephone and email. On two occasions, the client signed an acknowledgement of receipt confirming that the correspondence had been delivered to her.

When the relationship manager left, a new manager called the client to ask her what she wanted to do about the foreign exchange transactions, which had resulted in losses of USD 500,000. Surprised and shocked, the client complained to the former relationship manager that she had never been informed of these losses.

After requesting and receiving all the bank statements, the client confirmed to the bank that she had reviewed them. More than three months later, the client turned against the bank, claiming that she had never authorised the foreign exchange transactions. For his part, the relationship manager claimed that he had never carried out any transactions without the client's instructions. However, there was no trace of instructions relating to foreign exchange transactions in the bank's files or in the records of telephone conversations. The client also alleged that she had not received the bank documents when she signed the acknowledgements of receipt.

Following a claim for payment of USD 1,070,582, the Court of First Instance dismissed the

client's claim. It left open the question of whether the client had given instructions. In any event, the client had ratified the transactions. Given her knowledge and experience in banking, it is unlikely that she would have signed the acknowledgements of receipt without having received the remaining bank documentation. She could also understand, thanks to her training in finance, that her portfolio included *forex* positions. Even if the parties were bound by an *execution only* relationship, the client was required to check the documents provided. In the absence of any objection within the time limit, the client was deemed to have ratified the disputed transactions.

On appeal by the client, the Court of Justice examined the fiction of ratification arising from the complaint clause.

The Court of Justice began by recalling the Federal Court's case law on the validity of such clauses. In particular, the fiction of ratification applies to transactions that the client should have discovered by paying the attention that the circumstances required of him.

The complaint clause is sometimes combined with a remaining bank clause, which gives rise to a fiction of acceptance. Where the bank intentionally deviates from its client's instructions when there was no reason to expect it to do so, the bank commits an abuse of rights by relying on this double fiction (acceptance and ratification). However, the Federal Court recently ruled that this case law was not applicable where the client had received the documentation and could or should have realised that the transactions were irregular (4A_449/2018 commented *in* cdbf.ch/1061). It is therefore necessary to ascertain the extent of the client's knowledge in order to determine whether she was in a position to understand the bank documentation.

In the present case, the Court of Justice does not rule on the question of whether the documents were actually received when the acknowledgements of receipt were signed. In any event, the client received the documentation by email after the telephone conversation with the new relationship manager. She was therefore informed of the disputed transactions as soon as she received them. Given her training and experience in banking, she could, or at least should have, understood the significance of these account statements. She herself stated in an email to the new account manager that she had carefully examined the documentation provided. However, she waited several months after this last email to contest the disputed transactions.

Consequently, the client ratified the disputed transactions by actually receiving the relevant documentation, which she could and should have understood, and without objecting within the 30-day period. The appeal is therefore dismissed.

This ruling, which carefully examines the case law of the Federal Court, is a good reminder of the scope of complaint clauses and the method to be followed in order to assess their validity.

The court first examines whether the documentation was actually provided. If not, the case law on abuse of rights applies (see cdbf.ch/1028/ and references cited). If the documents were provided, the judge then determines whether the client should or could have realised that the transactions were irregular. If the client does not have sufficient knowledge or experience, the complaint clause is ineffective. In the other case, the judge will finally check whether the contractual objection period, generally 30 days, has been complied with. If it has not been complied with, abuse of rights may, in our opinion, still apply, albeit more restrictively than in the situation where the documentation was not provided.