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Accountability

Qualitative and quantitative requirements for conclusions

Par Grégoire Geissbühler le 16 June 2021

In its judgement 4A_287/2020 of 24 March 2021, the Federal Supreme Court considers the question of the enforcement of a decision to render an account, and makes three cautions : the conclusions to be enforced must be precise, possible and covered by the decision on the merits.

A company and a bank were bound by a set of banking contracts, in particular for the purchase and sale of options, as well as by a Lombard loan, which gave rise to disputed margin calls. This dispute has already given rise to two published rulings of the Federal Court (ATF 139 III 49, commented *on at* cdbf.ch/861/, on the scope of rendering of accounts in complex contracts, and ATF 143 III 420 on the interpretation of the Federal Court rulings).

The client was only partially successful in her proceedings for rendering of accounts, and the bank only partially complied. The client therefore brought an action for specific performance, requesting :

1. a complete and documented final account statement,
2. the list of positions held during the period in dispute,
3. the documents relating to her exposure and the values of the positions taken,
4. the ratios and calculations used for margin calls,
5. the minutes of certain telephone conversations between bank employees, and
6. a letter confirming the completeness of the documents submitted.

Only the second conclusion was (partially) admitted. The client appealed to the Federal Court.

The Federal Supreme Court first of all recalls the conditions for an action for specific performance, which requires a decision that has become final, that is sufficiently clear for the judge to be able to deduce the service requested, and that relates to an obligation that has not been extinguished since, before applying them to the case in question. It also states that the client had to indicate precisely (‘*konkret und klar*’) the documents to which it claimed to be entitled. We will come back to this.

Regarding the first conclusion, on the final account statement, the Federal Court rejects this claim as the lower court did, for lack of sufficient precision – it is not possible to check on the basis of its wording whether the information provided corresponds to the proper execution of the rendering of account, and the principal bears the burden of proof in the non-execution

procedure.

The second conclusion had been accepted, but it is limited to the documents referred to in the first judgement, without the scope of the latter being extended. The third conclusion concerned similar documents, which are refused for the same reason.

The complaint concerning the refusal to produce the calculations justifying the margin call could be well-founded, because such a document – even an internal one – makes it possible to understand the agent's activity, but the Federal Court considers that the principal has not sufficiently alleged the difference between the documents requested and those actually received. Moreover, it appears impossible to produce the underlying figures, and their absence does not prevent the understanding of the documents submitted.

Some transcripts of telephone conversations were not provided because they could not be produced. However, this does not entitle the applicant to the underlying information and related documents, which are not covered by the decision on rendering of account.

Finally, the letter confirming completeness was not the subject of the decision to be enforced, and therefore cannot be requested.

Ultimately, the documents requested by the principal have either already been submitted, were not covered by the decision to be executed, or were the subject of a conclusion that was too vague to be admissible. The appeal is therefore rejected.

Ask the principal what he wants to obtain through the rendering of accounts, and he will answer : 'Everything'. Everything he needs to assess his claim and his chances of success, everything that will enable him to understand the course of events, everything that will increase his room for manoeuvre in negotiations, everything that will prove his potential claim.

The action provided for in Article 400 of the CO theoretically offers the principal the tools to meet these needs. Accountability is described in turn in doctrine as having to be 'clear', 'detailed', 'truthful', 'complete' or 'understandable'. The choice of these adjectives shows that substantive law is profoundly *qualitative in nature*.

Conversely, procedural law, and enforcement law in particular, is *quantitative in nature*. If the requested enforcement does not consist of a sum of money or an objectifiable service, determining whether the debtor has performed correctly or whether enforcement can be demanded is a challenge. Judgment 4A_287/2020 is a good illustration of this : even claims that have been admitted on the merits are not necessarily enforceable if they are not sufficiently precise.

The result, namely a well-founded but unenforceable claim, is regrettable. But that does not make the Federal Supreme Court's decision wrong. The requirements of substantive and procedural law are cumulative, which works to the disadvantage of the principal.

This accumulation also explains the recourse to other tools : attempts at data protection actions (recently stopped by the Federal Court : 4A_277/2020), requests based on Art. 72 LSFin or recourse to a criminal complaint, thus hoping to take advantage of the more extensive powers of the Public Prosecutor's Office in this area. More creative counsels may – if possible –

attempt a preliminary procedure in a foreign country whose legal tradition is more conducive to gathering evidence, approach a third party to obtain information (e.g. an auditor) or attempt a pilot procedure to test the representative’s reaction and gather an initial set of documents. However, this creativity will not replace a procedure more suited to the law of mandate.

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