

Submission of accounts

What right to information ?

Par Célian Hirsch le 6 July 2021

In its ruling [4A 599/2019](#), the Federal Court considered a request for the submission of accounts by a client against his bank following a dispute over a margin call.

In November 2010, the client opened an account with a Swiss bank in order to invest his assets through foreign exchange transactions and by buying and selling options on currencies and precious metals. He received a loan from the bank and signed a general pledge agreement.

After the SNB abandoned the minimum exchange rate on 15 January 2015, the bank requested a margin call. As the client did not respond, the bank liquidated all positions. The client ended up with a negative balance of more than 3 million dollars.

The bank filed a request for payment with the Geneva Court of First Instance. The client filed a counterclaim and made preliminary submissions for the rendering of an account based on [Art. 400 CO](#). The client's submissions detailed the required documents in twenty points. The rendering covers two distinct periods :

- The first period is the one prior to the margin call. The client particularly wants to check whether the costs and margins charged by the bank are reasonable or whether they constitute hidden commissions.
- The second period is the one relating to the margin call. The client mainly wants to check how the bank valued his options and how they were liquidated.

After the bank had provided several documents relating to the margin call, the Court of First Instance dismissed the client's claims for an accounting in their entirety.

The client was partially successful on appeal. For the period prior to the margin call, the Court of Justice considered that the client did not have a legitimate interest in obtaining the required documents. Not only had he never contested any transaction, but any potential disputes would now be time-barred due to the complaints clause. The Court of Justice nevertheless recognises that the client has the right to obtain the complete monthly investment reports as well as details of any retro-commissions. For the second period, the client is entitled to receive detailed explanations of the method used to calculate the volatility of the options, as well as screen shots from the bank's computer system relating to various currency options ([ACJC/1515/2019](#)).

In response to an appeal lodged by the client, the Federal Court considered the following issue

in particular : does the principal have the right to obtain information about the period prior to the dispute, given that he never raised any objection until the dispute arose ?

According to [art. 400 para. 1 CO](#), the agent is obliged, at the request of the principal, to render an account of his management at all times (*Rechenschaftspflicht*) and to return everything he has received in this respect, for whatever reason (*Herausgabepflicht*). This right to render an account is limited by the rules of good faith ([art. 2 para. 2 CC](#)). In banking matters, the information provided must cover all the elements enabling the customer to understand the transactions carried out and to be informed of any errors made by the agent.

In the case in question, the client argues firstly that the information requested should enable him to examine whether the bank has levied hidden commissions. The complaint clause would not be applicable if these commissions were undetectable. The principal would thus be pursuing a legitimate interest.

The Federal Court is not convinced by this argument. It considers the request to be vexatious and its execution to be disproportionate. Not only was the information in question contained in the documentation already provided to the client – which he apparently did not keep – but the client also never disputed or questioned the price of the OTC options. The present dispute concerning the margin call does not justify the monitoring of the bank's entire activity since the beginning of the relationship. The mere assumption of hidden commissions does not justify it either. Therefore, the request for an accounting for the period prior to the margin call is abusive.

Regarding the period relating to the margin call, the Federal Court considers that the request for daily option valuations and daily margin calculations for the months preceding the margin call is also disproportionate and vexatious. The information in question is also not necessary to monitor the proper and faithful execution of the mandate. In particular, the parties were bound by an *execution only* relationship in which the bank was custodian and pledgee. Therefore, it was not required to warn the client of the risks associated with his speculative strategy based on the floor rate, nor to regularly inform him of the margin status.

Finally, in a last step, the Federal Supreme Court considered that the securities ledger, which makes it possible to reconstruct transactions (cf. [FINMA Circular 2008/4](#)), is not intended for customers. It was therefore up to the customer to explain why this information was not already apparent from the documentation and information provided by the bank, which he did not do.

Therefore, the Federal Court rejected the appeal.

This judgement, to be read together with the judgement [4A_287/2020](#) (commented on in Geissbühler, [cdbf.ch/1186](#)), provides welcome clarification on accountability, but also raises some issues. We will therefore limit ourselves to just one : is the rendering of accounts really abusive when, during a dispute with his agent, the principal wishes to monitor the agent's activities that are not directly related to the dispute ? In this ruling, the Federal Court indeed holds that such a request is abusive when it is not related to the dispute. However, it is questionable whether this solution can really be generalised or whether it is, on the contrary, closely linked to the case in question. In particular, the Court of Justice had accepted in this case that the bank should inform the client of any remuneration paid to a third party, even though this aspect was not linked to the issue of the margin call.

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