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Banking contracts

Reacting in due time or losing one’s rights

Par Célian Hirsch le 9 September 2021

When a bank informs its client that it will liquidate his securities if he does not react within the allotted time, can the client complain *after* the fact about the liquidation of his securities ? The Federal Court addressed this issue in its ruling 4A_354/2020 of 5 July 2021.

A Mexican national has had a bank account in Geneva since 2006. In 2010, the bank amended its general terms and conditions so that it could terminate the contractual relationship at any time, with immediate effect, without having to give any reason. It could thus sell the assets at market price if the customer did not give any transfer instructions.

In 2016, the bank had doubts about its client’s tax compliance. After sending him a letter by poste restante, on 22 April 2016 it sent him another letter to his address in Mexico. This letter stated that the bank was obliged to terminate the contractual relationship. The customer thus has a period of two months from the date the letter was sent to contact them quickly ; otherwise, the securities will be liquidated.

The client received the letter on 17 June 2016, but did not telephone the bank. In fact, he did not use this means of communication to contact them from Mexico. Nevertheless, he went to the bank in mid-July 2016, where he learned that his securities had been sold. He formally contested this sale.

The bank subsequently refused to transfer his assets to another bank in Switzerland because the client had not provided it with a tax compliance document. It changed its position after several decisions by the Geneva Court of Justice and transferred the assets to another bank, which enabled the client to buy back his securities, albeit at a higher price.

The client referred the matter to the Geneva Court of First Instance to request that the bank reimburse the difference between the value of the securities at the time of sale and that at the time of redemption (i.e. USD 57,858). The Court considered that the bank had sold the securities without instructions and without complying with the general terms and conditions. Moreover, even if the client had responded to the bank’s letter, he would not have been able to prevent the sale of his securities since the bank refused any transfer of his assets. The Court therefore upheld the claim.

The Court of Justice overturned the judgement. It left open the question of the application of the general terms and conditions. However, it held that the client had been negligent in ‘not responding immediately' to the bank's letter. Yet there was no indication that the bank would have refused to suspend the sale of the securities if the client had come forward. On the contrary, the bank's representative stated in the proceedings that it would have kept them if the client had given instructions in time. The fact that the bank subsequently refused to transfer the client's assets was independent of the sale of the securities (ACJC/624/2020).

Seized by the client, the Federal Court begins by recalling that the principle of good faith requires the client to challenge in a timely manner the banking transactions that he does not accept. This principle also applies if he is informed in advance by the bank of a transaction that he does not want.

In this case, the decisive factor is whether the client should have contested the sale of his securities within the time limit set by the bank's letter. When he received the letter, the client still had five days according to the deadline, and in reality even 12 days, given that the sale of his securities finally took place on 30 June 2016. The Court of Justice considered that this period was sufficient. The Federal Court considers that the client does not criticise this element. Furthermore, the fact that he came to the bank in mid-July 2016 does not fulfil the condition of a timely reaction. Therefore, the client did not challenge the liquidation of his securities in time. This conclusion allows the Federal Court to dispense with an examination of the general conditions.

The fact that the bank would have kept the securities if the client had reacted in time is a question of fact, which the Federal Court reviews only from the point of view of arbitrariness. However, the client does not demonstrate that this assessment of the facts would be arbitrary.

Therefore, the Federal Court rejects the client's appeal.

In an area where the general terms and conditions increasingly impose obligations on customers, the reader may be surprised that the Federal Court is creating new obligations for the customer based on the rules of good faith (art. 2 para. 1 CC).

In fact, case law had already deduced from these rules that the customer was in breach of contract when she did not take note of her mail held at the bank (for a critical commentary, see cdbf.ch/1051/). In this new ruling, the Federal Court broadened its case law. Unfortunately, without any reference to case law or doctrine, it created an obligation to react to any request from the bank, failing which the bank could then breach the contract (*in casu* sale of securities without authorisation) without consequence, even if the customer reacts quickly after this breach.

Perhaps the particular facts of the case, in particular that the client did not wish to contact his bank from Mexico, have led the Federal Court to be more demanding towards this client. It is to be hoped that this case law will not be extended to situations for which it is not intended.

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