CENTRE DE DROIT
BANCAIRE ET FINANCIER

Banking contracts

Action for restitution of precious metals (Act II)

Par Nicolas Ollivier le 19 October 2021

In its judgement 4A_223/2021 of 26 August 2021, the Federal Supreme Court ruled on an action for the protection of clear cases concerning the surrender of 299 ounces of physical gold. This dispute has already given rise to a ruling by the Federal Court, which referred the case back to the *Obergericht* of the canton of Aargau for a new judgement on the application of the *clausula rebus sic stantibus* (4A_263/2019 of 2 December 2019, commented on *in* cdbf.ch/1109/). By final judgement of 14 April 2020, the Cantonal Court ordered the bank to hand over the 299 ounces of gold to a German client.

Following this victory, the client claimed what was owed to him from the bank in the form of 299 coins of one ounce each, i.e. 100 Canadian Maple Leaves, 100 Österreichische Philharmonics and 99 Australian Gold Nuggets. To do so, he refers to a letter from the bank dated 11 February 2014 mentioning fees estimated at CHF 14 per ounce 'for the conversion of the gold balance into coins', i.e. a total of CHF 4,186. The bank refused and offered to deliver these coins for EUR 22,815 or one-kilo bars for EUR 29,590.

On 4 August 2020, the client filed a request for protection in clear-cut cases, concluding with the conviction of the bank for the physical delivery of the required coins, at a price of CHF 14 per ounce. The cantonal authorities dismissed the client's case, who then appealed to the Federal Supreme Court.

The Federal Supreme Court reiterated that an interpretation of a contract according to the principle of trust (art. 18 CO) is not in itself excluded in proceedings in clear-cut cases. However, in order to demonstrate that a legal situation is clear-cut, the conclusion and content of the contractual provision must be unambiguous in accordance with the principle of trust.

The customer has a claim for restitution of 299 ounces of gold as an item. Under Art. 71 para. 1 CO, if the item owed is determined only by its type, the choice belongs to the debtor, unless the contrary results from the case. It is necessary to determine in the case in question whether an agreement has been reached on the type of 'delivery' of the gold, the denomination and the amount of the costs incurred for the purchase of the gold in the denomination requested by the customer.

The client claims that a contractual agreement was concluded between him and the bank in that he accepted the bank's offer to deliver the gold coins for CHF 14 per ounce and that the bank is thus bound by its offer. To this end, he relies on the correspondence exchanged with the

bank between 2014 and 2020. According to the Federal Court, although the letter of 11 February 2014 indicates a price of CHF 14 per ounce, it appears that the bank refuses in this letter to physically hand over the gold coins to the client and that it only mentions in connection with the costs of CHF 14 a 'conversion' and not a 'delivery'. Furthermore, two subsequent letters from the bank's board are irreconcilable with the letter of 11 February 2014 because they mention costs of CHF 14 per ounce for the 'conversion' into bars and not into gold coins as mentioned in the letter of 11 February 2014. According to the Federal Supreme Court, it cannot be assumed that a real and common intention is undisputed or immediately demonstrable, nor that a normative agreement is clearly established in accordance with the principle of trust.

The Federal Court rejected the client's claims of denial of justice, violation of the right to be heard and arbitrary establishment of the facts. The client does not dispute that the letters in question are incoherent. He only accuses the bank of having 'deliberately […] created confusion' in order to render his action inadmissible. The client nevertheless forgets that it is he himself who refers to the letters in question to draw his claim from the respective passages that would be favourable to him. The question of whether this correspondence written by the bank should be interpreted to its disadvantage by analogy with the rule of ambiguous clauses (*in dubio contra stipulatorem*) can be left open. This rule, even if applicable, would only come into play if other means of interpretation failed and the existing doubts could not be resolved otherwise. The summary procedure for clear-cut cases is excluded for such in-depth questions of interpretation.

The request for clear-cut cases is therefore definitively declared inadmissible. It will be up to the client to initiate new action to assert his rights. In this regard, the Federal Court notes in an *obiter dictum* that the question arises as to what extent the action for delivery of the exhibits brought by the present proceedings concerns the case of the restitution of 299 ounces of gold, which has already been decided, and thus prevents a new decision (art. 59 para. 2 lit. e CPC). If the client brings an action through the ordinary procedure, this question will have to be examined as part of the admissibility examination.

The main lessons to be learned from this case are that few factual and legal situations are clear and that it is advisable to anticipate the enforcement of a successful judgment by formulating conclusions that can be directly and easily enforced by a request for enforcement under art. 338 et seq. CPC, otherwise at the risk of finding themselves lost in the limbo of procedural law, which is more down-to-earth than substantive law (for another recent example, see cdbf.ch/1186/). In the event of the client initiating enforcement proceedings (art. 338 et seq. CPC), the client should obtain the delivery of 299 ounces of physical gold in the form chosen by the bank free of charge, the client having missed the opportunity to request specific gold coins in the first trial and the bank that of asserting its claims regarding costs by formulating a conclusion making delivery subject to payment of costs (art. 342 CPC). After making the delivery, the bank could, however, still claim payment of costs in a new trial, but the roles and the burden of proof would then be reversed.

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