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E-forex Trading

The end of the minimum exchange rate and the unexecuted stop-loss order

Par Célian Hirsch le 19 November 2021

Is a customer who trades online a consumer ? Is a bank that cannot immediately execute a stop-loss order when the market is illiquid liable for the losses incurred by the customer ? In the 4A_54/2021 ruling, the Federal Court considered these two questions, but only ruled on one of them.

In 2014, a client with some experience in the financial field used the IT platform of a bank in the canton of Vaud to speculate on the variation in the EUR/CHF exchange rate.

The e-forex contract, which must be accepted in order to access the platform, stipulates the following in Article 4.13/iv :

'You acknowledge and accept that under certain market conditions it will be difficult or even impossible to execute orders at a specific price or to liquidate certain positions, to estimate a fair or acceptable price and to estimate risk exposure. This may occur, for example, when the market is illiquid or during an electronic or telecommunications system failure or in a case of force majeure. Placing a 'stop-loss' order does not necessarily guarantee risk limitation because, under certain market conditions, your order cannot be executed.'

On 8 January 2015, the client places a stop-loss order at 1.194 to protect his position consisting of the purchase of EUR/CHF 2,000,000 at 1.204119.

On 15 January at 10:30, the SNB announces that it is abandoning the CHF/EUR floor rate. This caused a wave of panic and made the CHF/EUR market illiquid. The bank in Vaud suspended trading for almost an hour. When it resumed at 11.35am, the client's position was automatically liquidated at a significantly lower rate (around 1.04) than the rate at which it had been acquired (1.204119). The client then finds himself with a negative balance of CHF 287,641.95.

The bank brings an action for payment against the client before the patrimonial chamber of the canton of Vaud. In particular, it submits a legal expert report produced in a parallel procedure relating to the events surrounding the SNB's abandonment of the minimum exchange rate.

Both the patrimonial chamber and the cantonal court, on appeal by the client, uphold the bank's claim. According to the cantonal courts, the client accepted the e-forex contract, which allows the bank not to execute a stop-loss order under certain market conditions (art. 4.13/iv. of the

contract) and this contractual clause is not unfair within the meaning of art. 8 LCD (HC/2020/857).

In his appeal to the Federal Court, the client argued in particular (1) that he had never accepted the e-forex contract, (2) that his stop-loss order should have been executed before the bank suspended trading and (3) that clause 4.13/iv. of the contract was null and void because it was contrary to art. 8 LCD.

Regarding the first aspect, the bank provided the experts with an extract from the computer code relating to the verification of acceptance of the 13 chapters of the contractual clauses. On this basis, the expert report found that access to the bank's computer platform could not be gained without the user first accepting the e-forex contract by registering on the platform.

The Federal Court emphasises that some slight doubts may remain even when strict proof is required. In the case in point, even if the expert appraisal of the computerised conclusion of the contract did not relate to the specific case, the Federal Court considers the finding of the client's acceptance of the e-forex contract to be free of arbitrariness.

Regarding the client's complaint about the non-execution of his stop-loss order before the market became illiquid, the Federal Court conducted a detailed examination of the expert report. It emphasised the distinction between the triggering of the order, which occurs at the earliest when the threshold is crossed, and its execution, which is necessarily deferred. The execution of the order at the indicated threshold is therefore not guaranteed.

In this case, the last tradable quote (before the CHF/EUR market became illiquid) was higher than the client's stop-loss order. The bank was therefore right not to execute this order before the suspension of the market due to its illiquidity.

Finally, in a last complaint, the client maintains that clause 4.13/iv. of the e-forex contract would be null and void due to art. 8 LCD. This provision stipulates the following :

'A person acts unfairly if, in particular, they use general terms and conditions which, contrary to the rules of good faith, provide, to the detriment of the consumer, a notable and unjustified imbalance between the rights and obligations arising from the contract.'

There is a doctrinal controversy as to the interpretation of the term 'consumer'. One school of thought favours a restrictive interpretation, namely that this term refers only to everyday consumer services. Another school of thought, on the contrary, advocates a broader interpretation, according to the purpose of the standard and the systematic nature of the law. The notion of consumer would then not be restricted to everyday consumer services.

The Federal Court recognises 'a certain consistency' in this second trend. That being said, it expressly leaves this 'delicate question' open. Indeed, even if this provision were to apply, clause 4.13/iv. would not be null and void. In particular, the fact that the risk of the illiquid market is assumed by the customer, and not by the bank, does not allow for the conclusion that there is a 'significant and unjustified disproportion' within the meaning of art. 8 LCD. The Federal Court even seems to go in the opposite direction :

'The customer who, through foreign exchange transactions, can obtain dizzying profits must

also assume the proportional risks inherent in this form of poker.’

The Federal Court therefore rejected the client’s appeal.

This judgement merits two brief remarks.

Firstly, it is interesting to note that the bank seems to have proven the conclusion of the contract thanks to its computer code, and not by proving the conclusion of the contract in casu.

Secondly, the Federal Court is moving towards a broad interpretation of the concept of consumer, contrary to the assessment adopted by the Vaud Cantonal Court. This allows bank customers to retain a glimmer of hope against general terms and conditions that impose more and more obligations on them.

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