

## Mandate contract

# Question of interpretation : half a million, 1 or 100 call options ?

Par Fabien Liégeois le 9 February 2022

Lawyers only focus on the verb. The received idea is almost correct, but therefore false : they also become infatuated with deeds. [Art. 18 para. 1 CO](#), central to our legal system, illustrates this when it states that the real and common intention of the parties takes precedence over their inaccurate expressions. The bias in favour of the primacy of will is, moreover, nothing specific to Switzerland. Inherited from Roman law, it is consequently one '*of the dominant features of the great European codes*' (cf. Winiger, CR CO I, n. 1 ad art. 18). This will, described as subjective (without fear of pleonasm), is established in the light of all the concrete circumstances. The latter should include the economic reality. This is not quite the approach that prevails in this case, which involves two actors somewhat overwhelmed by a financial instrument, in this case a *call option*. Let's get to the facts.

An external investment advisor recommends that Jean acquires 100 *call* options on the shares of the listed company Actelion. Jean goes to his bank and states that he wants to carry out the transaction 'immediately'. After opening a deposit account for this purpose, the employee presents him with a summary of the stock market order on which it is indicated, on the first line, '*1 contract of 100 calls*', then, on the second and third lines, '*buy – 100 – call strike 160.- shares [Actelion]*'. Jean signs this summary. Once this is done, the employee contacts her colleagues on the trading floor twice to place the order. Jean hears what the employee says on the phone, but the *traders'* responses elude him. Following this meeting, Jean pays CHF 20,000 into the account he has just opened. The bank buys him one *call* option at a price of 157 francs. This option entitles him to acquire 100 Actelion shares [the underlying asset] at a price of 160 francs [the *strike price*] '*between now and December 2016*' [the expiry date]. The transaction costs him a total of 277.20 francs, because the bank charges a commission of 120 francs and 20 centimes in *taxes*. The sum is debited from his account, but Jean does not immediately receive confirmation of his order. When he asks for it, the employee invites him to consult the document on his *e-banking*.

Then, something happened that changed everything. Rumours were circulating that Actelion shares could be the subject of a takeover bid, which sent the share price soaring. The stock experienced its biggest rise in 16 years. John then realised (but a little too late) that his bank had bought him one (single) *call* and not 100.

He seeks redress and argues that his loss corresponds to the difference between the financial situation he would have been in if the bank had correctly executed his instruction and the one

he is in in the absence of such execution. The patrimonial chamber, then the civil court of appeal of the cantonal court of the canton of Vaud, ruled in his favour and ordered the financial institution to pay more than CHF 550,000, with interest at 5 % per year.

In a ruling [4A\\_9/2021](#) of 12 January 2022, handed down by five judges, the Federal Court upheld the bank's appeal. It gives the following reasons.

In an *execution only* relationship, the bank acts only on the instructions of the client. To obtain compensation, the client must show that the four conditions of contractual liability are met ([art. 398 para. 1 CO cum art. 321e para. 1 CO](#)). The first of these is the violation of the obligations arising from the contract. More specifically, the assessment of the bank's diligence depends on the content of the client's instructions. Stock market orders are unilateral expressions of will, subject to receipt, the interpretation of which follows general principles. Art. 18 para. 1 CO, applicable in this case by analogy, as mentioned above, gives priority to the '*subjective will*' ; the principle of trust ([art. 1 para. 1 CC cum art. 2 para. 1 CO](#)) only intervenes in a subsidiary capacity.

*In casu*, the Cantonal Court described the content of the stock market order as adversarial ('1 contract of 100 calls' vs. 'buy – 100 – call strike 160.- shares [Actelion]'). The Federal Court will rely on this reading of the document to base its judgement and overturn that of the previous court. In particular, it found that Jean had agreed when the employee told him '*you are investing 155 francs today*' and, if the share price exceeded 160 francs, '*that is when you will assert your right to buy the shares for 16,000 francs [...]*'. He adds that Jean '*spoke about buying the shares [Actelion] for 16,000 francs in the future*', which '*the employee understood*'. Finally, he notes that during *the second telephone conversation, the client heard the employee say that he wanted to buy a contract on strike calls [Actelion], confirmed that they would still be left with one [contract] and heard that he would be charged 157 francs plus expenses*. He considers that the Cantonal Court has acted arbitrarily : '*by holding that the client could not hear what the employee was saying since he was on another telephone line*'. He can thus conclude that '*the meaning understood by the bank corresponds to the meaning stated by the client, the real will is established*'. There is therefore no need to try to objectify this will.

We would like to make three remarks.

1° The higher cantonal court reached the conclusion that the client intended to speculate and buy derivatives to resell them before maturity, with no intention of buying the underlying assets, largely based on the transcript of the telephone conversations. We reproduce an extract.

- “[Employee] : So we agree, you want to buy the 25,000 calls ?
- [Jean] : That's it, we understand each other, yeah yeah
- [Employee] : We agree ?
- [Jean] : ... at 160 calls and the 100 call options at 160... they're not the same as...
- [Employee] : No, but it's the one he [other employee] gave me, it's the ones you're telling me about
- [Jean] : The calls at 160...
- [Employee] : Yeah, the call strike at 160 that matures in December 2016
- [Jean] : That's exactly

[...]

- [Employee] : *Not the shares with the finality, just the calls ?*
- [Jean] : *That's it*
- [Employee] : *Yeah, no, that's right*
- [Jean] : *It's 100 call strikes at 160, not the shares"*

We recognise that the form of these exchanges obscures the substance. The fact remains that Jean expressed his willingness to acquire 100 *call options* when he replied '*voilà*' to the employee who said to him : '*not the shares*'. In any case, it is not 'manifestly untenable' to understand it in this way. In addition to the content of the declarations of will, Art. 18(1) CO requires the context to be taken into account. In this case, Jean's investment advisor testified to say '*that the advice he had given him was intended to limit the risk in the event of a loss*'. The purchase of a *call* option certainly presents a high risk due to the leverage effect, but this risk is limited to the amount of the investment, i.e. the premium paid. Jean had stated that he was prepared to lose all of his investment, which suggests that he had the premium in mind, not the holding of the shares. Custom, in this case that of the banking and financial world, is also important in determining the real will of the parties. In practice, however, it is very common for the investor to acquire an option without intending to exercise it. This type of listed instrument can be transferred before maturity. The investor therefore has no need to have the liquid assets necessary to exercise the options (and therefore to purchase the shares) at the time of acquiring them (the options). The financing can come later. The two stages are quite distinct from an economic point of view.

2. It seems to us to be debatable whether the stock market order is contradictory : the first line is the one that causes confusion since it indicates '*1 contract of 100 calls*' (unlike the other two where it says : '*buy – 100 – call strike 160*'). However, the ambiguous expression can be understood as follows by a novice : '*I wish to carry out 1 transaction consisting of acquiring 100 call options*'. The customer could thus reasonably assume that he had concluded a *contract* for 100 *call options* (which in turn would allow the acquisition of 100 shares).

3° It would be strange if Jean received a tip, decided to trust it, went to the bank, opened an account for this purpose and only ended up risking 157 francs, especially since the fees proportionally exceed 75 % of the amount invested ( $(120 + 0.20) / 157$ ). The fact that he deposited 20,000 francs in his account also tends to support his argument. It is true that he could have simply downloaded the confirmation of the stock market order to realise that he had only purchased one option. Despite Jean's 71 logins to the *e-banking* system, the bank was unable to prove that he had *actually* read them. This element cannot therefore be used against him.

It is not clear that the client's statement corresponded to his true will, as the Federal Court concluded, especially since his cognitive power was limited to arbitrariness on this question of fact. Could something else have convinced the judges ? The advice that Jean received may seem suspicious, as may his eagerness to pass on the order. This is just a hypothesis. When the verb is unclear and the actions hesitant, why not try to read between the lines ?

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