CENTRE DE DROIT
BANCAIRE ET FINANCIER

Liability of the bank

Margin call and realisation of assets, a criminal risk for the bank ?

Par Teymour Brander le 16 February 2022

Can a bank be guilty of unfair management in the context of the realisation of assets following a margin call ? Do the transaction confirmations provided by the bank constitute evidence with increased probative value under Art. 251 PC ? In the 6B_1381/2021 ruling, the Federal Court answers both questions in the negative.

A client entered into an *execution only* options and futures trading contract with his bank in 2015. This contract obliged the client to meet the margin requirements that the bank deemed necessary at all times, depending on the transactions initiated. If the client did not meet the margin requirements, the bank could realise the positions at its discretion. This margin system allows the bank to protect itself against the risk of losses generated by the planned transactions.

In 2018, the bank sent the client a margin call. The client did not respond. The bank realised the client's positions by recording them in its books and sent him a transaction confirmation stating that his positions had been realised on the stock market. The bank makes no mention whatsoever that it has entered the positions in its books. Following this operation, the client's account shows a negative balance of more than 4 million francs.

The client files a criminal complaint against the bank, notably for unfair management (art. 158 CP) and forgery of securities (art. 251 CP). He accuses the bank *(i)* of having caused him harm by taking over the positions he held on his behalf at below-market prices and *(ii)* of having falsely stated in the transaction confirmations that his positions had been realised on the stock market.

The public prosecutor's office ordered the criminal complaint to be dismissed. This decision was confirmed by the cantonal court, and the client lodged an appeal in criminal matters with the Federal Supreme Court.

The Federal Supreme Court began by recalling its case law on forgery of documents (art. 251 PC). In particular, the document in question must have a high degree of credibility, as a simple written lie does not constitute intellectual forgery.

In banking matters, the Federal Court has accepted that an account statement sent to a client by a governing body has increased probative value (cf. ATF 120 IV 361) – while this characteristic has been denied in the case of statements automatically drawn up without

signature by an asset manager (cf. TF 6B_199/2011).

In the case in question, the Federal Supreme Court noted that there was no particular relationship of trust between the parties. The client managed his account alone, as no management mandate had been agreed with the bank. In any case, the transaction confirmations were sent to him following non-compliance with margin calls, so that the bank was not acting in the client's interests. Furthermore, the Federal Supreme Court notes that the disputed documents were generated automatically and did not bear any signature.

In these circumstances, and contrary to what the cantonal court had ruled, the Federal Supreme Court considers that the transaction confirmations do not have increased probative value. Any offence of forgery is therefore excluded.

The Federal Court then considered the offence of unfair management. It reiterated that the role of manager requires a sufficient degree of independence and autonomous power of disposal over the assets managed.

In casu, the Federal Court reiterated that the bank did not act as either a manager or an investment advisor. The contract concluded was in fact *execution only*. The bank therefore had no duty to manage the client's assets or to generally safeguard his interests.

It then emphasised that the realisation of the assets was contractually provided for to protect the bank's interests in the event that the client did not honour a margin call. The bank was therefore not acting in the client's interest by carrying out the disputed transactions.

The bank therefore had no management or safeguarding duty, so that the status of manager within the meaning of Article 158 of the Penal Code cannot be upheld.

Consequently, the Federal Court confirmed the dismissal of the criminal complaint.

This judgement raises two points.

The solution adopted by the Federal Supreme Court seems coherent to us. From a contractual point of view, however, the bank must not lose sight of the fact that it is obliged, when realising pledged assets, to respect the rules of good faith – to the extent compatible with its own interests – and to limit the client's loss as much as possible, even in the presence of an *execution only* relationship (cf. TF 4A_71/2015).

Finally, we note that the Federal Court emphasises the *execution only* nature of the relationship between the bank and the client to exclude the commission of the offence of unfair management. Would the result have been different if the client had given a management mandate to the bank ?

Firstly, during the execution of the management mandate, the bank undeniably acts as manager. The bank has a duty to manage the client's assets. Secondly, when realising assets following a margin call, the bank has the right to prioritise its interests over those of the client. The bank is authorised to liquidate the client's positions at its discretion. That being the case, the management mandate remains in place. The dichotomy between these two situations creates, in our opinion, a lack of clarity as to the bank's capacity as manager within the

meaning of Article 158 of the Penal Code when executing the security. In view of the ruling commented on here, it would be difficult, in our opinion, to completely exclude any risk of unfair management for a bank when realising assets following a margin call.
