CENTRE DE DROIT
BANCAIRE ET FINANCIER

Bank liability

Purchasing structured products without prior customer approval

Par Yannick Caballero Cuevas le 13 May 2022

In an execution-only banking relationship, does the bank necessarily have to make good the loss suffered by the customer when it acquires securities without prior authorization ? Case 4A_469/2020 answers in the negative.

In April 2005, a customer opened an account with a bank in Lugano, and to this end signed the general terms and conditions, as well as a residual bank clause. Following the opening of the banking relationship, the customer invested in equity funds through an advisor at another bank.

On July 26, 2007, the bank sold 347 units of the “COMINVEST FONDAK P” equity fund and 26 units of the “_____EF LUX SM GER B” equity fund on behalf of the customer. Following these transactions, the bank purchased 85 units of the structured product “Bonus Certificates PLUS” for a value of EUR 85,000.

When the investment matured on July 30, 2010, the customer’s account was credited with EUR 2,269.76. The customer then brought a claim for payment against the bank before the Lugano court. He accused the bank of having purchased shares in the structured product without any instruction or ratification on his part. He therefore claims payment of an amount of EUR 92,541.35 equal to the amounts not received from the sale of the share funds and related dividends, as well as the cash used to acquire the structured product. In addition, he requested repayment of EUR 2,201.50 representing retrocessions received by the bank. The Lugano court rejected the client’s claim, and he appealed to the Ticino cantonal court. The latter ordered the bank to pay the retrocessions received and rejected the appeal for the remainder.

The customer lodged an appeal in civil matters with the Swiss Federal Supreme Court.

First of all, the Federal Court found that the parties had not contested the legal characterization of the banking relationship. Thus, the parties had concluded an execution-only banking contract. In this context, the bank undertakes to execute only the customer’s investment instructions. It may, however, execute orders on behalf of the customer if the latter has authorized the transaction or given an instruction to that effect. On the other hand, if the bank sells the client’s securities without the client’s authorization or instruction, it is liable for the damage caused in accordance with art. 398 of the Swiss Code of Obligations.

The Swiss Federal Supreme Court then reiterates the principles that apply to remainder and

claim clauses (see also cdbf.ch/1028/). In the case in point, the double fiction of receipt and ratification was not applied by the Tribunale d'appello, which held that the bank was abusing its right by relying on it. Despite this finding, the Tribunale d'appello noted that the customer had nevertheless lost the right to compensation for the loss suffered. On the one hand, there had been no clear objection to the disputed transaction, even though the customer had stated that he had objected to it orally at a meeting with the bank on April 9, 2008. On the other hand, the Tribunale d'appello indicated that the principle of good faith required the customer to clarify his position regarding the transaction and to formalize his objection. Moreover, the customer would have had the opportunity to contest the transaction once again during his two visits to the bank on February 17 and November 13, 2009, during which the bank provided him with account statements and statements of assets. The Federal Court concluded that the Tribunale d'appello had not violated federal law by finding that the customer had been unable to prove that he had contested the disputed transaction. The burden of proof lies with the plaintiff (art. 8 CC).

In the absence of a clear and timely contestation, the customer's order must be ratified. As the Federal Court points out, the customer cannot wait for the (unfavorable) development of the investment before expressing his disagreement.

The Federal Court therefore dismisses the appeal.

On the basis of this ruling, we can deduce that a bank which executes a purchase or sale transaction without the customer's prior instruction or authorization cannot invoke the bank-remainder and claims clauses, without committing an abuse of rights. However, this reasoning can only be applied in the context of an execution-only or investment advisory relationship. The situation would be different in an asset management relationship, given the manager's power of disposal.

Even if the double fiction does not apply in this case, the solution adopted is no different. This is a reminder of the importance for the client of clearly and promptly contesting the disputed transaction as soon as he receives the bank statements or notification of the transaction, failing which he will be denied ratification on the grounds of late contestation (see also cdbf.ch/1196/).
