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Account rendering

Second act of the right to information

Par Célian Hirsch le 7 June 2022

What information can a client receive from her bank in a dispute over a margin call ? The Swiss Federal Supreme Court recently addressed this question in ruling 4A_599/2019 (commented in cdbf.ch/1190/). It is now confronted with this question again in ruling 4A_436/2020, which concerns the same set of facts.

In October 2012, a Lebanese company opened an account with a Swiss bank. The client invested in “in-house” OTC options and structured products designed and issued by the bank, which was also the counterparty.

After the SNB abandoned the floor rate on January 15, 2015, the bank requested a margin call. As the client did not respond, the bank liquidated all positions. The customer is left with a negative balance of EUR 430,062.

The bank brought a claim for payment before the Geneva Court of First Instance. The customer files a counterclaim and makes a preliminary statement of claim based on art. 400 of the Swiss Code of Obligations. The customer’s submissions set out the required documents in twenty points. The statement of account covers two distinct periods :

The first is the period prior to the margin call. In particular, the customer wishes to verify whether the costs and margins charged by the bank are reasonable, or whether they constitute hidden commissions.
The second period relates to the margin call. The customer would particularly like to check how the bank has valued his options and how they have been liquidated.

After having its case dismissed by the Geneva courts, the company brought the matter before the Swiss Federal Supreme Court, where only a few of the recitals are developed below. In particular, the issue of retrocessions is dealt with specifically in commentary cbdf.ch/1237.

With regard to the period prior to the margin call, the Federal Court emphasized that the client had not made the slightest objection or reservation concerning the transactions carried out by the bank on the basis of her instructions for more than two years, until the margin call. It was only when a dispute arose with the bank that the customer changed her attitude and wanted to control all banking activity since the beginning of the contractual relationship. Such a demand for a statement of account is abusive (art. 2 al. 2 CC).

Accordingly, the Federal Court ruled that the customer was not entitled to the requested documents relating to the period prior to the margin call.

Secondly, the Federal Court examined whether the client was entitled to know the identity of the bank employees whose names had been redacted on certain documents transmitted by the bank.

In particular, art. 328b of the Swiss Code of Obligations stipulates that the employer may only process data concerning the employee insofar as this data relates to the employee's ability to perform his job or is necessary for the performance of the employment contract. Where the employer processes other data concerning the employee, such processing must be justified by an overriding private or public interest (art. 13 al. 1 LPD).

In this case, the communication of employees' identities to the client is not data processing within the scope of art. 328b CO. For the communication to be lawful, a justifying reason is therefore required, such as the overriding interest of a third party.

However, according to the Federal Court, the customer does not have an overriding interest justifying the communication of this data. Indeed, knowing the names of employees is not necessary for her to verify whether the bank has fulfilled its contractual obligations. The bank is therefore not obliged to reveal the identity of its employees to its client.

In a final step, the Federal Court examines whether the customer has the information she needs to monitor the bank's activity on her account from the moment the margin call is made. In particular, the customer wishes to have access to all the factors used to value her options, including implicit volatility.

Here, the Federal Court goes into a somewhat technical explanation for the uninitiated. As there is no market price for OTC options, the bank refers to the Black & Scholes mathematical model. According to this method, the decisive parameters for calculating the price of an option are the current price of the underlying asset (in this case, the exchange rate), the option strike price, the time remaining before the option expires, the risk-free interest rate and the volatility of the underlying asset. Of these elements, volatility is the only one that cannot be recognized directly, but requires valuation.

In the case in point, as a result of the abandonment of the floor rate, the price of the options to be bought back to neutralize the open positions essentially corresponded to their intrinsic value, so that implicit volatility, the determining parameter of time value, was a factor with virtually no impact. The client thus had no interest in receiving this information, as she already had all the information she needed to value the disputed options.

Consequently, as in the above-mentioned decision 4A_599/2019, the Federal Court dismisses the appeal.

The Federal Court's reasoning concerning access to employees' identities is welcome. In particular, it contrasts with the view taken by the Geneva Court of Justice in its decision ACJC/1515/2019, which gave rise to the above-mentioned decision 4A_599/2019. Indeed, the Court had considered that the bank's duty to give a full account of its activity includes providing information on the employees who have acted in connection with the customer's bank account,

even though it is ultimately the employer who is answerable for the activity of his auxiliaries.

As a result of this ruling, the protection of the employee's personality now takes precedence over the principal's interest in knowing the employee's identity. In our opinion, an exception could nevertheless be made in certain circumstances, for example where the employee has committed an unlawful or even criminal act against the principal.
