

## Margin Call

# ***Res iudicata* of a first judgment and subsequent action for partial damages**

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In a ruling 4A\_525/2021 intended for publication, the Swiss Federal Supreme Court clarifies the scope of *res iudicata* of a first judgment in the context of a second lawsuit concerning a partial action for damages brought by a customer against her bank.

Following turbulence on the financial markets in 2018, the foreign currency positions held by a company with a Swiss bank experienced significant fluctuations in value, resulting in insufficient account coverage. On August 10, 2018, the bank sends a margin call to the company, which does not respond. The bank terminates the banking relationship and liquidates the company's positions in the amount of EUR 46,325,500. The balance is debited from the company's current account, which shows a negative balance of EUR 17,080,021.86.

On April 28, 2019, the bank files a claim for payment against the company before the Zurich Handelsgericht. It claims payment of the negative balance. On January 31, 2020, the Handelsgericht handed down a judgment ordering the company to pay the negative balance. It ruled that the company was contractually bound to meet the margin requirements, and that the bank was entitled to terminate the contract and liquidate the positions. Neither the bank nor the company appealed against this first judgment, which is now in force.

In a subsequent partial action, the company filed a claim for damages against the bank with the Zurich Handelsgericht. In its view, the bank had breached the banking contract when it set the option redemption prices. According to the company, these were not in line with the market, which prevented it from liquidating the positions on August 10, 2018. Still according to the company, the price of the options was EUR 27,776,758.35, so that the company suffered losses of EUR 18,548,741.65, i.e. the difference between EUR 46,325,500 and 27,776,758.35. Nevertheless, the company is seeking payment of EUR 90,003 with interest.

The bank raises the exception of *res iudicata*. On September 3, 2021, the Handelsgericht ruled that the case could not be heard on the basis of the first judgment.

The company lodged an appeal in civil matters with the Federal Supreme Court. It complained that the Zurich court had wrongly considered that the subject matter of the second partial action and that of the first judgment were identical, so that the first judgment had the force of *res iudicata*.

Res judicata prevents any subsequent court from ruling on an action whose subject matter is identical to that of the final judgment. It extends to the individualized claim and excludes any dispute over the facts existing at the time of the judgment. The Federal Court notes that the identity of the subject matter of the dispute is assessed in terms of its content. Two criteria are examined : the conclusions of the claim and the complex of facts alleged. In the case of pecuniary claims, reference must be made to the grounds of the claim. Thus, the identity between the claim decided in the previous decision and the claim asserted in the new application – founding the exception of res judicata – must be understood not grammatically but materially.

To determine whether the first judgment has the force of res judicata, the Federal Court looks at the estoppel effect of the first judgment. The Handelsgericht and the bank argued that the company's claim for damages should have been lodged – as a defense – at the first trial, on pain of lapse of time, as it was closely linked to the bank's initial claim for payment. The Federal Court recalls that only the operative part of a judgment has the force of res judicata.

Although the claim for damages corresponds thematically to the first judgment, i.e. the events of August 2018, this does not make it inadmissible. Moreover, the company is asserting an independent claim, since the first judgment concerns the right to enforce the margin call, whereas the second claim relates to the bank's breach of its obligations when setting the redemption prices for the options. Res iudicata therefore does not extend to the latter aspect.

Finally, the Federal Court noted that a party to the second action cannot be criticized for failing to present – on pain of foreclosure – a fact or objection in the first action, if this defense was not relevant in the first action. In this respect, the bank had concluded in its motion – at the first trial – that the issue of breach of its contractual obligations was irrelevant, as only the fact that the company had not met the margin call was decisive. Consequently, this defense would not have changed the outcome of the first trial.

Accordingly, the Federal Court accepted the company's appeal and held that the fact that it had not asserted its claim for damages at the first trial by way of set-off or counterclaim did not prejudice it. The first judgment does not preclude the company's partial action on the grounds of res iudicata (art. 59 al. 2 let. e CPC).

This judgment highlights the importance of conclusions in determining the scope of res judicata. Even if a court recognizes the validity of a margin call, a customer may subsequently bring an action for damages. Plaintiff banks – in the context of a margin call – will need to pay particular attention to submissions to counter any subsequent action for damages, including a negative finding of no breach of contract. The latter will, however, extend the scope of the dispute from the claim for payment.