CENTRE DE DROIT
BANCAIRE ET FINANCIER

Margin call

A contentious fall of the ruble

Par Nicolas Ollivier le 17 April 2023

A wealthy customer and a bank have been doing business for over 30 years. As part of an execution-only contractual relationship, the customer orders forward currency transactions (RUB/JPY and RUB/CHF). On December 16, 2014, due to a sharp fall in the Russian ruble exchange rate, the bank prematurely closes the forward transactions after contacting its customer, resulting in losses for the latter. The customer initiated legal proceedings to claim compensation equivalent to the smaller loss he would have suffered had the positions been maintained until maturity. However, his claim was rejected by the courts (TF 4A_455/2022).

The facts of this case are particularly unclear, and evidence of their existence is limited to interviews with the client and bank employees, as well as client contact notes, which are sometimes imprecise. A reading of the Zurich Obergericht's ruling (LB210029-O/U) reflects the gaffe that prevailed on the day the ruble plummeted, after the Russian central bank had painted a black picture of the country's economy for 2015. The complaint of arbitrary assessment of the facts is rejected for lack of sufficient reasoning. The Federal Court thus relied exclusively on the facts as set out in the judgment under appeal. As the considerations of the Cantonal Court concerning the breach of contract are essentially based on an assessment of the facts, the decision of our High Court leaves us somewhat disappointed.

The customer argued that the contract had been breached on the grounds that the margin call did not allow sufficient time to re-establish the safety margin, nor did it quantify the amount required to do so. In the absence of a margin call in accordance with the contract, the closing of the forward transactions would constitute a breach of contract.

The Federal Court first notes that the lower court did not consider the margin call to be superfluous, but on the contrary expressly recognized that a margin call in line with the applicable contract was a prerequisite for the subsequent liquidation. In our opinion, this confirms that the margin call must give the client the opportunity to re-establish the margin of safety required to maintain his positions, before being entitled to liquidate them if he fails to reconstitute the margin.

The fundamental question is what constitutes a margin call. Our High Court goes on to note that the previous court, on the basis of its assessment of the evidence (hearings of witnesses and parties ; internal notes), found that telephone conversations had taken place, during which a margin call had been communicated to the customer in accordance with the contract. Among other things, the customer was informed of the amount of supplementary cover required, and

was given an “immediate” and quite sufficient deadline to set up the supplementary cover. Even if the appellant was not informed of a precise amount “in francs and centimes”, this was not prejudicial according to the Obergericht, as the customer stated that he was not in a position to provide the supplementary cover within the allotted time. The customer contested this assessment of the facts, but failed, according to the Federal Court, to demonstrate its arbitrariness. In the same vein, its legal reasoning was not sufficient to demonstrate a violation of federal law, as the customer was content with superficial criticisms such as the claim that the Obergericht had “inadmissibly overturned the contractual structure”. The appeal was therefore dismissed.

The Federal Court noted that the action would have been dismissed anyway, as the customer was claiming damages in Swiss francs instead of rubles, the currency in which the bank’s alleged debt would have been paid (art. 84 CO). In fact, the forward transactions concerned provided for the bank to credit the customer’s account with rubles and debit it with Swiss francs on a fixed value date. Had the contract been executed, the customer would have received rubles rather than Swiss francs. He would therefore have had to denominate his conclusions in rubles. The currency in which the customer thinks, or that in which the portfolio statements are issued, is irrelevant.

It would have been fortunate if the customer had presented his case in a better way, and if the Federal Court had considered to what extent a margin call is legally a formal demand within the meaning of the Swiss Code of Obligations (art. 102-109 CO). As a general rule, when the obligation is a pecuniary debt for which the debtor does not know the exact amount, the creditor must indicate the amount claimed. Consequently, a margin call should indicate the exact amount to be contributed and the precise date/time by which the customer must satisfy the margin call, failing which the margin call should not be deemed valid (in this sense ACJC/1406/2013 of November 22, 2013, c. 5.1). However, in the case in point, the customer did not know the exact amount to be contributed, which should have been considered a breach of contract. However, the customer undoubtedly broke the causal link between this breach and the damage by refusing to sign a pledge in favor of the bank and by being unable to meet the margin call by bringing in new funds.

This case demonstrates once again how important it is for banks to put in place a robust process for dealing with margin deterioration, distinguishing between the various stages and providing the clearest possible communications to their customers, both as regards the amount to be contributed and the deadline for doing so. For customers, this ruling is a reminder that, in the event of a dispute, they must be extremely careful not to lose any rights they may have by ratifying transactions or interrupting the causal link through their own conduct.
